161

167-362

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 206.

THE CALIFORNIA NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

NAT. KENNEDY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED DECEMBER 26, 1894.

(15,757.)

(15,737.)

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The California National Bank, appellant, and Nat. Kennedy, respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or

2 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of November, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court U. S.

[Endorsed:] (Copy.) Filed Dec. 1st, 1894. L. H. Brown, clerk, by Geo. A. McCalvy, deputy.

3 Copy.

Filed Dec. 1st, 1894.

L. H. BROWN, *Clerk,*
By GEO. A. McCALVY, *Deputy.*

Petition.

To the Honorable Stephen J. Field:

By direction of the Comptroller of the Currency given to Frederick N. Pauly, receiver of the California National bank, and who took possession of the effects of that bank, by appointment of the Comptroller of the Currency, on the twenty-ninth day of December, one thousand eight hundred and ninety-one, the California National Bank respectfully petitions your honor to allow a writ of error to the supreme court of California to bring up a judgment of that court rendered first of March, 1894, which affirmed a judgment which had been previously rendered in the superior court of San Diego county against The California National Bank and in favor of one Nat Kennedy for $18,807.52.

The Federal question is this: whether section 5136 of the Revised Statutes of the United States and the attendant sections do not prohibit a national bank from purchasing or subscribing for stock of another corporation.

That question arises upon the following facts:

Two-thirds of the stock of the California savings bank was owned in equal parts by one Collier and one Norcross. Collier was the president of the California National bank. One day the cashier of the California National bank directed the officer of the savings bank to cancel the certificates of Collier and Norcross and issue a certificate of the stock to him as cashier of the California
4 National bank. This was done. So far as appears, it was done without the knowledge of either Collier or Norcross, for neither of them signed the certificate. This was done without any authority of the directors of the national bank, nor did the latter bank give any consideration or take it as collateral for any loan. Afterwards the cashier surrendered this certificate and took one to the California National bank, simply.

The savings bank failed about ten months afterwards and Nat Kennedy, tax-collector of San Diego county, who had deposited monies received for taxes with the savings bank, sued the California National bank as a stockholder of the savings bank.

It is to bring up a judgment in the tax-collector's favor upon this state of facts that the petitioner respectfully applies to your honor for the allowance of a writ of error.

EDWARD WINSLOW PAIGE, *Of Counsel.*

5 STATE OF CALIFORNIA, *ss:*

And now here the judges of the supreme court of the State of California make return of this writ by annexing hereto and sending herewith, under the seal of the supreme court of California, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

STATE OF CALIFORNIA, *ss*:

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our supreme court, sitting at San Francisco on the 1st day of December, one thousand eight hundred and ninety-four, it is thus contained, the following being the entire record in the case:

On the 18th day of January, in the year of our Lord one thousand eight hundred and ninety-three, the appellant, the above-named California National Bank, came here into our supreme court, by James E. Wadham, its attorney, and filed in the said court a notice of appeal and transcript of judgment filed in the superior court of San Diego county, State of California, and Nat. Kennedy, the respondent in the said action, afterwards appeared in the said court by Works & Works and W. H. Fuller, his attorneys; which said notice of appeal and the transcript on appeal thereto annexed are as follows:

6 In the Supreme Court of the State of California.

NAT. KENNEDY, Plaintiff, *vs.* THE CALIFORNIA SAVINGS BANK, S. G. Havermale, J. W. Collins, D. D. Dare, and The California National Bank, Defendants.	No. 19226. Amended Complaint.

On appeal from the superior court of the county of San Diego, State of California.

The plaintiff complains of the defendants and alleges:

1. That the defendant The California Savings Bank is and was at the times hereinafter mentioned a corporation duly organized and existing under the laws of the State of California and doing a banking business in the city of San Diego, State of California, and receiving deposits of money; that the defendant The California National Bank is and was at the times hereinafter mentioned a corporation duly organized and existing under the laws of the United States and doing a banking business in the city of San Diego, State of California.

2. That on the second day of March, 1891, the plaintiff, as city treasurer, deposited with the defendants The California Savings Bank, at its said bank, as a special deposit, the sum of $10,000, for which the said corporation issued and delivered to the plain-
7 tiff a certificate of deposit, a copy of which is filed herewith, marked "Exhibit A," and made a part of this count of the complaint.

3. That at all the times mentioned in this complaint the defendants, except the California savings bank, were and they are now stockholders of said corporation.

4. That the plaintiff is informed and believes that the capital

stock of said California savings bank was at all the times mentioned in this complaint and now is $250,000, divided into twenty-five hundred shares of one hundred dollars each, and that of said stock there was subscribed at the time said deposit was made and said certificate issued twenty-five hundred shares and no more.

5. That at all the times herein mentioned the defendant Havermale was and now is the owner of five hundred of said shares; the defendant Collins, five hundred of said shares; the defendant Dare, five hundred of said shares; the defendant California National Bank, nine hundred and ninety of said shares; one William Collier, five of said shares, and one F. T. Hill, five of said shares of said stock.

6. That at the time of said deposit the said savings bank was indebted, as the plaintiff is informed and believes, to other persons in a large sum, the aggregate amount of which the plaintiff is unable to state.

6½. That on the twelfth day of November, 1891, the plaintiff demanded of said defendant, The California Savings Bank, the payment and delivery to him of said money, which was refused, and said sum remains wholly unpaid and due to the plaintiff.

7. That the plaintiff is still the owner and holder of said
8 certificate of deposit and is entitled to have and receive said money.

8. That the defendants The California Savings Bank and the California National Bank have since said deposit was made suspended payment and are now insolvent.

Wherefore the plaintiff demands judgment that the money so deposited by him be returned to him, or that upon a failure to return the same the plaintiff have judgment for $10,000 and interest thereon; that the total amount of the debts of said bank be ascertained and established, and that the defendant stockholders be adjudged to pay each the proportionate amount of said sum for which he is liable, and for all other proper relief.

Second Count.

For a second cause of action the plaintiff complains and alleges:

1. That the defendant The California Savings Bank is and was at the times hereinafter mentioned a corporation duly organized and existing under the laws of the State of California and doing a banking business in the city of San Diego, State of California, and receiving deposits of money; that the defendant The California National Bank is and was at the times hereinafter mentioned a corporation duly organized and existing under the laws of the United States and doing a banking business in the city of San Diego, State of California.

2. That on the second day of March, 1891, the plaintiff, as city treasurer, deposited with the defendant The California Savings
9 Bank, at its said bank, as a special deposit, the sum of $10,000, for which the said corporation issued and delivered to the plaintiff a certificate of deposit, a copy of which is filed here-

with, marked "Exhibit B," and made a part of this count of the complaint.

3. That at all the times mentioned in this complaint the defendants, except the California savings bank, were and they now are stockholders of said corporation.

4. That the plaintiff is informed and believes that the capital stock of said California savings bank was at all the times mentioned in this complaint and now is $250,000, divided into twenty-five hundred shares of one hundred dollars each, and that of said stock there was subscribed at the time the said deposit was made and said certificate issued twenty-five hundred shares and no more.

5. That at all the times herein mentioned the defendant Havermale was and now is the owner of five hundred of said shares; the defendant Collins, five hundred of said shares; the defendant Dare, five hundred of said shares; the defendant The California National Bank, nine hundred and ninety of said shares; one William Collier, five of said shares, and one F. T. Hill, five of said shares of said stock.

6. That at the time of said deposit the said savings bank was indebted, as plaintiff is informed and believes, to other persons in a large sum, the aggregate amount of which the plaintiff is unable to state.

6½. That on the twelfth day of November, 1891, the plaintiff demanded of said defendant, The California Savings Bank, the payment and delivery to him of said money, which was refused, and said sum remains wholly unpaid and due to the plaintiff.

7. That the plaintiff is still the owner and holder of said certificate of deposit and is entitled to have and receive said money.

8. That the defendants The California Savings Bank and The California National Bank have since said deposit was made suspended payment and are now insolvent.

Wherefore the plaintiff demands judgment that the money so deposited by him be returned to him, or that upon a failure to return the same plaintiff have judgment for $10,000 and interest thereon; that the total amount of the debts of said bank be ascertained and established, and that the defendant stockholders be adjudged to pay each the proportionate amount of said sum for which he is liable, and for all other proper relief.

Third Count.

For a third cause of action the plaintiff complains and alleges:

1. That the defendant The California Savings Bank is and was at the times hereinafter mentioned a corporation duly organized and existing under the laws of the State of California and doing a banking business in the city of San Diego, State of California, and receiving deposits of money; that the defendant The California National Bank is and was at the times hereinafter mentioned a corporation duly organized and existing under the laws of the

United States and doing a banking business in the city of San Diego, State of California.

2. That on the fourteenth day of July, 1891, the plaintiff, as city treasurer, deposited with the defendant The California Savings Bank, at its said bank, as a special deposit, the sum of $10,000, for which the said corporation issued and delivered to the plaintiff a certificate of deposit, a copy of which is filed herewith, marked "Exhibit C," and made a part of this count of the complaint.

3. That at all the times mentioned in this complaint the defendants, except the California savings bank, were and they are now stockholders of said corporation.

4. That the plaintiff is informed and believes that the capital stock of said California savings bank was at all the times mentioned in this complaint and now is $250,000, divided into twenty-five hundred shares of one hundred dollars each, and that of said stock there was subscribed at the time said deposit was made and said certificate issued twenty-five hundred shares and no more.

5. That at all the times herein mentioned the defendant Havermale was and now is the owner of five hundred of said shares; the defendant Collins, five hundred of said shares; the defendant Dare, five hundred of said shares; the defendant California National Bank, nine hundred and ninety of said shares; one William Collier, five of said shares, and one F. T. Hill, five of said shares of said stock.

6. That at the time of said deposit the said savings bank was indebted, as the plaintiff is informed and believes, to other persons in a large sum, the aggregate amount of which the plaintiff is unable to state.

6½. That on the twel-th day of November, 1891, the plaintiff demanded of said defendant, The California Savings Bank, the payment and delivery to him of said money, which was refused, and said sum remains wholly unpaid and due to the plaintiff.

7. That the plaintiff is still the owner and holder of said certificate of deposit and is entitled to have and receive said money.

8. That the defendants The California Savings Bank and The California National Bank have since said deposit was made suspended payment and are now insolvent.

Wherefore the plaintiff demands judgment that the money so deposited by him be returned to him, or that upon a failure to return the same the plaintiff have judgment for $10,000 and interest thereon; that the total amount of the debts of said bank be ascertained and established, and that the defendant stockholders be adjudged to pay each the proportionate amount of said sum for which he is liable, and for all other proper relief.

Fourth Count.

For a fourth cause of action the plaintiff complains and alleges:

1. That the defendant The California Savings Bank is and was

at the times hereinafter mentioned a corporation duly organized and existing under the laws of the State of California and doing a banking business in the city of San Diego, State of California, and receiving deposits of money; that the defendant The California National Bank is and was at the times hereinafter mentioned a corporation duly organized and existing under the laws of the United States and doing a banking business in the city of San Diego, State of California.

2. That on the fourteenth day of July, 1891, the plaintiff, as city treasurer, deposited with the defendant The California
13 Savings Bank, at its said bank, as a special deposit, the sum of $10,000, for which the said corporation issued and delivered to the plaintiff a certificate of deposit, a copy of which is filed herewith, marked "Exhibit D," and made a part of this count of the complaint.

3. That at all the times mentioned in this complaint the defendants, except the California Savings Bank, were and they are now stockholders of said corporation.

4. That the plaintiff is informed and believes that the capital stock of said California savings bank was at all the times mentioned in this complaint and now is $250,000, divided into twenty-five hundred shares of one hundred dollars each, and that of said stock there was subscribed at the time the said deposit was made and certificate issued twenty-five hundred shares and no more.

5. That at all the times herein mentioned the defendant Havermale was and now is the owner of five hundred of said shares; the defendant Collins, five hundred of said shares; the defendant Dare, five hundred of said shares; the defendant California National Bank, nine hundred and ninety of said shares; one William Collier, five of said shares, and one F. T. Hill, five of said shares of said stock.

6. That at the time of said deposit the said savings bank was indebted, as the plaintiff is informed and believes, to other persons in a large sum, the aggregate amount of which the plaintiff is unable to state.

6½. That on the twel-th day of November, 1891, the plaintiff demanded of said defendant, The California Savings Bank, the payment and delivery to him of said money, which was refused, and said sum remains wholly unpaid and due to the plaintiff.

14 7. That the plaintiff is still the owner and holder of said certificate of deposit and is entitled to have and receive said money.

8. That the defendants The California Savings Bank and The California National Bank have since said deposit was made suspended payment and are now insolvent.

Wherefore the plaintiff demands judgment that the money so deposited by him be returned to him, or that upon a failure to return the same the plaintiff have judgment for $10,000 and interest thereon; that the total amount of the debts of said bank be ascertained and established, and that the defendant stockholders be adjudged to pay each the proportionate amount of said sum for which he is liable, and for all other proper relief.

Fifth Count.

For a fifth cause of action the plaintiff complains and alleges:

1. That the defendant The California Savings Bank is and was at the times hereinafter mentioned a corporation duly organized and existing under the laws of the State of California and doing a banking business in the city of San Diego, State of California, and receiving deposits of money; that the defendant The California National Bank is and was at the times hereinafter mentioned a corporation duly organized and existing under the laws of the United States and doing a banking business in the city of San Diego, State of California.

2. That on the fourth day of November, 1891, the plaintiff, as city treasurer, deposited with the defendant The California
15 Savings Bank, at its said bank, as a special deposit, the sum of $5,500, for which the said corporation issued and delivered to the plaintiff a certificate of deposit, a copy of which is filed herewith, marked "Exhibit E," and made a part of this count of the complaint.

3. That at all the times mentioned in this complaint the defendants, except the California savings bank, were and they are now stockholders of said corporation.

4. That the plaintiff is informed and believes that the capital stock of said California savings bank was at all the times mentioned in this complaint and now is $250,000, divided into twenty-five hundred shares of one hundred dollars each, and that of said stock there was subscribed at the time the said deposit was made and certificate issued twenty-five hundred shares and no more.

5. That at all the times herein mentioned the defendant Havermale was and now is the owner of five hundred of said shares; the defendant Collins, five hundred of said shares; the defendant Dare, five hundred of said shares; the defendant The California National Bank, nine hundred and ninety of said shares; one William Collier, five of said shares, and one F. T. Hill, five of said shares of said stock.

6. That at the time of said deposit the said savings bank was indebted, as the plaintiff is informed and believes, to other persons in a large sum, the aggregate amount of which the plaintiff is unable to state.

6½. That on the twel-th day of November, 1892, the plaintiff demanded of said defendant, The California Savings Bank, the payment and delivery to him of said money, which was re-
16 fused, and said sum remains wholly unpaid and due to the plaintiff.

7. That the plaintiff is still the owner and holder of said certificate of deposit and is entitled to have and receive said money.

8. That the defendants The California Savings Bank and The California National Bank have since said deposit was made suspended payment and are now insolvent.

Wherefore the plaintiff demands judgment that the money so deposited by him be returned to him, or that upon a failure to re-

turn the same the plaintiff have judgment for $5,500 and interest thereon; that the total amount of the debts of said bank be ascertained and established, and that the defendant stockholders be adjudged to pay each the proportionate amount of said sum for which he is liable, and for all other proper relief.

WORKS & WORKS,
WILLIAM H. FULLER, *City Att'y,*
Attorneys for Plaintiff.

STATE OF CALIFORNIA, }
County of San Diego, } *ss:*

Nat. Kennedy, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except the matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

NAT. KENNEDY.

Subscribed and sworn to before me this twenty-sixth day of February, 1892.

NAT. R. TITUS,
[SEAL.] *Notary Public.*

17 "EXHIBIT A."

$10,000. No. 163.

The California Savings Bank.

SAN DIEGO, CAL., *March 2nd,* 1891.

Nat. Kennedy, city treas., has deposited in this bank ten thousand dollars, payable to the order of himself upon return of this certificate properly endorsed.

Special deposit.
(Not subject to check.)

FRED. T. HILL, *Cashier.*

Certificate of deposit.

"EXHIBIT B."

$10,000. No. 164.

The California Savings Bank.

SAN DIEGO, CAL., *March 2nd,* 1891.

Nat. Kennedy, city treas., has deposited in this bank ten thousand dollars, payable to the order of himself upon return of this certificate properly endorsed.

Special deposit.
(Not subject to check.)

FRED T. HILL, *Cashier.*

"EXHIBIT C."

No. 2034.

The California Savings Bank.

Certificate of deposit. Not subject to check.

SAN DIEGO, CAL., *July* 14*th*, 1891. $10,000.

N. Kennedy, city tr., has deposited in this bank ten thou-
18 sand dollars, payable to the order of himself, in current funds, on the return of this certificate properly endorsed.
(Special deposit.)

FRED. T. HILL, *Cashier.*

"EXHIBIT D."

No. 2035.

The California Savings Bank.

Certificate of deposit. Not subject to check.

SAN DIEGO, CAL., *July* 14*th*, 1891. $10,000.

N. Kennedy, cty. tr., has deposited in this bank ten thousand dollars, payable to the order of himself, in current funds, on the return of this certificate properly endorsed.
(Special deposit.)

FRED. T. HILL, *Cashier.*

"EXHIBIT E."

No. 2117.

The California Savings Bank.

Certificate of deposit. Not subject to check.

SAN DIEGO, CAL., *Nov.* 4*th*, 1891. $5,500.

Nat. Kennedy, cty. tr., has deposited in this bank fifty-five hundred dollars, payable to the order of himself, in current funds, on the return of this certificate properly endorsed.
(Special deposit.)

FRED. T. HILL, *Cashier.*

Endorsed: Filed Feb'y 26th, 1892. W. M. Gassaway, clerk, by J. A. Buckner, deputy.

19 (Title of Court and Cause.)

Demurrer.

Now comes the defendant The California National Bank and demurs to the complaint filed herein, and for cause of demurrer says:

I.

That there is a misjoinder of parties defendant, in this: that the California savings bank is joined as a party with the other defendants, who are charged with their liability as stockholders, but California savings bank is not so charged, and there is no joint or several causes of action alleged as against all the defendants.

II.

That several causes of action have been improperly united, in this: that a cause of action is attempted to be charged for moneys received and deposited and unpaid against the California savings bank, and united with causes of action against the other defendants and their liability as stockholders, and these causes of action are not separately stated.

III.

That the complaint is ambiguous, in this: that the plaintiff sues in his personal character, while the cause of action, if any, stated in the complaint is in favor of the plaintiff as city treasurer of some city, but does not state for what city he was acting as treasurer.

IV.

It is uncertain, in this: that the plaintiff sues in his personal character, while the cause of action, if any, stated in the complaint is in favor of the plaintiff as city treasurer of some city, but does not state for what city he was acting as treasurer.

V.

That the complaint does not state facts sufficient to constitute any cause of action in favor of the plaintiff.

LUCE & McDONALD,
Attorneys for the Defendant California National Bank.

Endorsed: Filed March 17, 1892. W. M. Gassaway, clerk, by J. A. Buckner, deputy.

Received a copy of the within this seventeenth day of March, 1892.

WORKS & WORKS,
Attorneys for Plaintiff.

(Title of Cause.)

From minutes of court in department 2, of date March 25th, 1892.

Parties being present by their respective attorneys, the amended demurrer of defendant S. G. Havermale to amended complaint of plaintiff is, after oral presentation, overruled and defendant is given ten days to answer. The demurrer of defendants The California National Bank and The California Savings Bank to complaint is at

this time presented to the court and overruled and ten days given defendants to answer.

21 *Answer.*

(Title — Court & Cause.)

I.

Now comes the defendant The California National Bank and, in answer to the first count of complaint filed herein, denies that at all or any of the times mentioned in the complaint the defendant The California National Bank was at any time or now is the owner of nine hundred and ninety shares of the capital stock of the California savings bank or of any number of shares therein, and alleges that if any stock of the California savings bank was ever issued to this defendant it was issued without authority from this corporation defendant and without authority of law. Defendant also alleges that it has never acquired in the usual course of business or now has as owner any stock of the said defendant, The California Savings Bank.

II.

And in answer to the second count of the complaint filed herein the said defendant denies that at all or any of the times mentioned in the complaint the defendant California National Bank was at any time or now is the owner of nine hundred and ninety shares of the capital stock of the California savings bank or of any number of shares therein, and alleges that if any stock of the California savings bank was ever issued to this defendant it was issued without authority *of* from this corporation defendant and without authority of law. Defendant also alleges that it has never acquired in the usual course of business or now has as owner any stock of the said defendant, The California Savings Bank.

III.

And in answer to the third count filed herein the said
22 defendant denies that at all or any of the times mentioned in the complaint the defendant The California National Bank was at any time or now is the owner of nine hundred and ninety shares of the capital stock of the California savings bank or of any number of shares therein, and alleges that if any stock of the California savings bank was ever issued to this defendant it was issued without authority from this corporation defendant and without the authority of law. Defendant also alleges that it has never acquired in the usual course of business or now has as owner any stock of the said defendant, The California Savings Bank.

IV.

And in answer to the fourth count of the complaint filed herein the said defendant denies that at all or any of the times mentioned

in the complaint the defendant The California National Bank was at any time or now is the owner of nine hundred and ninety shares of the capital stock of the California savings bank or of any number of shares therein, and alleges that if any of the stock of the California savings bank was ever issued to this defendant it was issued without authority from this corporation defendant and without authority of law. Defendant also alleges that it has never acquired in the usual course of business or now has as owner any stock of the said defendant, The California Savings Bank.

V.

And in answer to the fifth count of the complaint filed herein the said defendant denies that at all or any of the times mentioned in the complaint the defendant The California National
23 Bank was at any time or now is the owner of nine hundred and ninety shares of the capital stock of the California savings bank or of any number of shares therein, and alleges that if any stock of the California savings bank or of any number of shares therein was ever issued to this defendant it was issued without authority from this corporation defendant and without authority of law. Defendant also alleges that it has never acquired in the usual course of business or now has as owner any stock of the said defendant, The California Savings Bank.

LUCE AND McDONALD,
Attorneys for said Defendant.

STATE OF CALIFORNIA, } ss:
County of San Diego, }

E. F. Pulsifer, being duly sworn, says: I am an officer, viz., a director, of the defendant corporation, The California National Bank, mentioned in the foregoing answer, and that I have read the said answer and know the contents thereof, and that the same is true of my own knowledge except as to the matters which are therein stated upon information and belief, and as to those matters I believe it to be true.

E. F. PULSIFER.

Subscribed and sworn to before me this ninth day of April, 1882.

[SEAL.]

W. D. BLOODGOOD,
Notary Public for San Diego County.

Endorsed: Filed Apr. 9, 1892. W. M. Gassaway, clerk, by J. A. Buckner, deputy.

24 Received copy of the within this 9th day of April, 1892.

WORKS & WORKS,
Attorneys for Plaintiff.

this time presented to the court and overruled and ten days given defendants to answer.

21 *Answer.*

(Title — Court & Cause.)

I.

Now comes the defendant The California National Bank and, in answer to the first count of complaint filed herein, denies that at all or any of the times mentioned in the complaint the defendant The California National Bank was at any time or now is the owner of nine hundred and ninety shares of the capital stock of the California savings bank or of any number of shares therein, and alleges that if any stock of the California savings bank was ever issued to this defendant it was issued without authority from this corporation defendant and without authority of law. Defendant also alleges that it has never acquired in the usual course of business or now has as owner any stock of the said defendant, The California Savings Bank.

II.

And in answer to the second count of the complaint filed herein the said defendant denies that at all or any of the times mentioned in the complaint the defendant California National Bank was at any time or now is the owner of nine hundred and ninety shares of the capital stock of the California savings bank or of any number of shares therein, and alleges that if any stock of the California savings bank was ever issued to this defendant it was issued without authority *of* from this corporation defendant and without authority of law. Defendant also alleges that it has never acquired in the usual course of business or now has as owner any stock of the said defendant, The California Savings Bank.

III.

22 And in answer to the third count filed herein the said defendant denies that at all or any of the times mentioned in the complaint the defendant The California National Bank was at any time or now is the owner of nine hundred and ninety shares of the capital stock of the California savings bank or of any number of shares therein, and alleges that if any stock of the California savings bank was ever issued to this defendant it was issued without authority from this corporation defendant and without the authority of law. Defendant also alleges that it has never acquired in the usual course of business or now has as owner any stock of the said defendant, The California Savings Bank.

IV.

And in answer to the fourth count of the complaint filed herein the said defendant denies that at all or any of the times mentioned

in the complaint the defendant The California National Bank was at any time or now is the owner of nine hundred and ninety shares of the capital stock of the California savings bank or of any number of shares therein, and alleges that if any of the stock of the California savings bank was ever issued to this defendant it was issued without authority from this corporation defendant and without authority of law. Defendant also alleges that it has never acquired in the usual course of business or now has as owner any stock of the said defendant, The California Savings Bank.

V.

And in answer to the fifth count of the complaint filed herein the said defendant denies that at all or any of the times mentioned in the complaint the defendant The California National
23 Bank was at any time or now is the owner of nine hundred and ninety shares of the capital stock of the California savings bank or of any number of shares therein, and alleges that if any stock of the California savings bank or of any number of shares therein was ever issued to this defendant it was issued without authority from this corporation defendant and without authority of law. Defendant also alleges that it has never acquired in the usual course of business or now has as owner any stock of the said defendant, The California Savings Bank.

LUCE AND McDONALD,
Attorneys for said Defendant.

STATE OF CALIFORNIA, } ss:
County of San Diego, }

E. F. Pulsifer, being duly sworn, says: I am an officer, viz., a director, of the defendant corporation, The California National Bank, mentioned in the foregoing answer, and that I have read the said answer and know the contents thereof, and that the same is true of my own knowledge except as to the matters which are therein stated upon information and belief, and as to those matters I believe it to be true.

E. F. PULSIFER.

Subscribed and sworn to before me this ninth day of April, 1882.

W. D. BLOODGOOD,
[SEAL.] *Notary Public for San Diego County.*

Endorsed: Filed Apr. 9, 1892. W. M. Gassaway, clerk, by J. A. Buckner, deputy.

24 Received copy of the within this 9th day of April, 1892.

WORKS & WORKS,
Attorneys for Plaintiff.

(Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

This cause having been submitted to the court for trial without the intervention of a jury, *and* the court, having heard the evidence and the argument of counsel and being fully advised in the premises, now finds the facts as follows:

1. That the defendant The California Savings Bank is and was at the times mentioned in the plaintiff's complaint a corporation duly organized and existing under the laws of the State of California and doing a banking business in the city of San Diego, State of California, and receiving deposits of money, and that the defendant The California National Bank is and was at said times a corporation duly organized and existing under the laws of the United States and doing business in the city of San Diego, State of California.

2. That the plaintiff, as the city treasurer of the city of San Diego, made the following deposits of money as such treasurer in the bank of said defendant, The California Savings Bank, to wit:

On the second day of March, 1891, the sum of $10,000; on the second day of March, 1891, the further sum of $10,000; on
25 the fourteenth day of July, 1891, the further sum of ten thousand dollars; on the fourteenth day of July, 1891, the further sum of $10,000.00, and on the fourth day of November, 1891, the further sum of $5,500, being in all the sum of $45,500.

3. That at the time of making such deposits and at all the times mentioned in the plaintiff's complaint the defendants S. G. Havermale, J. W. Collins, D. D. Dare, and the defendant The California National Bank were and still are stockholders in the said defendant, The California Savings Bank.

4. That at the time each and all of said deposits were made the defendant The California Savings Bank duly issued to the plaintiff therefor its certificate of deposit, showing the amount so deposited.

5. That said deposits so made by the plaintiff were not special deposits.

6. That the capital stock of the said California savings bank was at all the times mentioned in the complaint in this action the sum of $250,000, divided into twenty-five hundred shares of one hundred dollars each, and that of said stock there was subscribed at the time the said deposits were made twenty-five hundred shares and no more.

7. That at the times of making each and all of said deposits and at all the times mentioned in plaintiff's complaint the defendant S. G. Havermale was one of the stockholders and was and now is the owner of five hundred of said shares; the defendant J. W. Collins was one of the stockholders and was the owner of five hundred of said shares of stock; the defendant D. D. Dare was one of
26 the stockholders and was the owner of five hundred of said shares of stock, and the defendant The California National

Bank was one of the stockholders and was the owner of nine hundred and ninety-nine of said shares of stock. One William Collier was one of the stockholders and was owner of five of the shares of said stock, and one F. T. Hill was one of the stockholders and was owner of five shares of said stock.

8. That since the commencement of this action the defendant J. W. Collins has died. His death was suggested, but no substitution of his personal representatives or any other party was ever made, and no service of process had ever been made on defendant D. D. Dare.

9. That on the twel-th day of November, 1891, the plaintiff demanded of the said defendant, The California Savings Bank, the payment and delivery to him of said moneys so deposited, which was refused, and said sums were at the time this action was commenced and now are due and wholly unpaid.

10. That the plaintiff is still the owner and holder of said certificates of deposit and is entitled to have and recover the amount so deposited by him, with interest from the twel-th day of November, 1891, at seven per cent. per annum.

As conclusions of law from the foregoing facts the court finds that the plaintiff is entitled to recover of and from the defendant The California Savings Bank the sum of $47,493.75, and of and from the defendant S. G. Havermale the sum of $9,604.29, and of and from the defendant The California National Bank the sum of $18,807.52, provided that should the defendant The California Savings Bank pay said amount such payment shall be in
27 satisfaction not only of the amount found to be due from the said savings bank, but also in satisfaction of the amounts found to be due from defendant S. E. Havermale and the defendant The California National Bank as stockholders of said savings bank.

W. L. PIERCE,
Judge of said Superior Court.

Dated August 29th, 1892.

Endorsed: Filed Aug. 29th, 1892. W. M. Gassaway, clerk. J. A. Buckner, deputy.

Judgment.

(Title Court & Cause.)

This cause having been submitted to the court for trial without the intervention of a jury, and the court having made its findings of fact and conclusions of law, judgment is now rendered accordingly.

It is therefore considered, adjudged, and decreed by the court that the plaintiff recover of and from the defendant The California Savings Bank the sum of $47,493.75, and that the plaintiff recover of and from the defendant S. G. Havermale the sum of $9,604.29, and that the plaintiff recover of and from the defendant The California National Bank the sum of $18,807.52.

It is further considered and adjudged by the court that the plaintiff have and recover of and from all of said defendants his costs and charges in this behalf laid out and expended, taxed at $——.

It is further considered and adjudged by the court that if the defendant The California Savings Bank shall pay the amount
28 adjudged against it that such payment shall be in satisfaction of the full amount here adjudged, not only against said defendant, but against the defendants S. G. Havermale and The California National Bank.

W. L. PIERCE,
Judge of the Superior Court.

Dated August 29th, 1892.

Endorsed: W. M. Gassaway, clerk. J. A. Buckner, deputy.

Entered Book 10, page 351, Sept. 8th, 1892.
Docketed 397.

Certificate to the Judgment-roll C. C. P., Sec. 670.

(Title Court & Cause.)

I, the undersigned, county clerk of the county of San Diego, State of California, and *ex officio* clerk of the superior court in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book 10 of said court, at page 350; and I further certify that the foregoing papers, hereto annexed, constitute the judgment-roll in said action, except as notice therein.

Witness my hand and seal of said court this 26th day of October, 1892.

[SEAL.] C. W. THOMPSON, *Clerk*,
By E. J. ENSIGN,
Deputy Clerk.

Endorsed: Filed Oct. 26th, 1892. C. W. Thompson, clerk, by E. J. Ensign, deputy.

29 *Notice of Intention to Move for New Trial.*

(Title of Court and Cause.)

To Messrs. Works & Works and William H. Fuller, Esq., attorneys for plaintiff:

Take notice that defendant The California National Bank intends to move the court to vacate and set aside the decision of the court rendered in the above cause and to grant a new trial of said cause upon the following grounds, to wit:

1. Insufficiency of the evidence to justify the decision of the court.
2. Errors in law occurring at the trial and excepted to be the defendant.
3. That the decision is against law.

Said motion will be made upon a statement of the cause hereafter to be prepared.

J E. WADHAM,
Attorney for Defendant California National Bank.

Endorsed: Service of the within admitted by copy this 12th day of September, 1892. Works & Works, attorneys for plaintiff. Filed Sept. 12th, 1892. W. M. Gassaway, clerk, by J. A. Buckner, deputy clerk.

30 In the Superior Court of the County of San Diego, State of California, Department No. 3.

NAT. KENNEDY, Plaintiff,
vs.
THE CALIFORNIA SAVINGS BANK, S. G. HAVERmale, J. W. Collins, D. D. Dare, and The California National Bank, Defendants. } Number 6261.

Statement of Motion for New Trial.

Be it remembered that upon the trial of this action, which was tried by the court without a jury, the following proceedings were had:

FRED. T. HILL, sworn on behalf of plaintiff, testified as follows: From March 2nd, 1891, to November the 12th, 1891, the time the California savings bank suspended, I held the position of cashier. These documents which you now show me are signed by me and were so signed while I was such cashier and were delivered to Nat. Kennedy, the city treasurer.

The plaintiff then offered in evidence as Exhibits Numbers 1, 2, 3, 4, and 5 the certificates of deposit, copies of which were filed with and made a part of the amended complaint in this action and numbered 163, 164, 2034, 2035, and 2117.

31 WITNESS, continuing: The words "special deposit" were put on with a rubber stamp. We had two forms of certificates of deposit; those are the two forms there. When the bank first opened we had the first form, and then afterwards we ordered the second form from some house in the East.

By Mr. WORKS:

Q. I wish, Mr. Hill, you would show us your stock book showing the issues of stock of the California savings bank and to whom.

WITNESS, continuing: The original issue consisted of five hundred shares each to J. W. Collins, S. G. Havermale, D. D. Dare, William Collier, and H. F. Norcross, issued January 13, 1890, the date of the opening of the bank, the owners of stock covering the time these several certificates of deposit were issued, from March 2nd, 1891, to November 4th, 1891.

(Defendant The California National Bank objected to the witness giving testimony as to who were the owners of stock at that time on the ground that the books were the best evidence.)

WITNESS, continuing: The books show that there were 990 shares issued to the California National bank, and that certificate was dated January 2nd, 1891, but was the consolidation of three previous certificates dated September tenth, 1890. After the issuance of these certificates they were held and are held by the California National bank. The certificates were delivered to the cashier or president of the California National bank, either one or the other.

32 I know they were held by the California National bank, because I have seen them in the possession of the bank. My impression is that I have seen them in the possession of the bank since its closing, but I will not state that. There was one dividend of five per cent. paid on account of this stock. William Collier was president and J. W. Collins was cashier of the California National bank at the time these certificates of stock were issued.

Mr. LUCE, on behalf of defendant California National Bank: The same kind of forms of certificates of deposit were issued to all depositors; they all had upon them the words "not subject to check."

Q. What is the meaning of the term?

(Plaintiff objected to this evidence on the ground that it was irrelevant, incompetent and immaterial, and asking the witness for a conclusion.)

The COURT: I do not suppose any certificate of deposit is subject to check. You have to turn in your certificate of deposit before the money is turned into the bank again so you can check it; it is a negotiable instrument and goes from hand to hand.

WITNESS, continuing: On March 2nd, 1891, the different accounts were all consolidated and the total amount of money due the city was figured up, and these certificates were issued in the amounts of ten thousand dollars each, and at Mr. Kennedy's request I marked them "special deposit." The money was already in the bank. I do not know why Mr. Kennedy asked me to put special deposit on these certificates.

33 By Judge LUCE: At the time these deposits were issued to Mr. Kennedy did any money pass from Mr. Kennedy to you into the bank at the particular time when these deposits were issued?

WITNESS, continuing: No, sir; the money that these deposits represented was on deposit with the national bank, with the exception of the funds the savings bank might have on hand. It was put in as an ordinary regular depositor would put in and was distributed with the rest of the funds of the bank. Nothing was stated to Mr. Kennedy relative to having this money put into any package by itself.

FREDERICK N. PAULY, sworn on behalf of plaintiff, testified as follows:

I am the receiver of the California National bank. I qualified as

such receiver December 29th, 1891. The certificate now shewn me came into my hands with other papers of the bank. There were other papers of a like kind belonging to the bank that came into my possession, but I do not remember where I first saw it. My first recollection about this was a package of envelopes or was in connection with papers that were kept in different envelopes, and they had some signifying indorsement upon the envelopes—some endorsed stocks—and I do not remember the other indorsements. I am not sure which envelope I found this in; this has been kept in the same place as I found it.

Plaintiff here offered in evidence certificates of stock in the California savings bank made out to the California National bank.

34 (And the defendant The California National Bank objected to the introduction of the certificates upon the grounds, first, that it was incompetent, irrelevant, and immaterial, and, second, that no authority had been shown on the part of the California National bank to receive such stock in any capacity, and, third, that no evidence had been introduced showing said stock to have been received in the regular course of business of the California National bank; which objection was overruled; and the defendant California National Bank duly excepted to the ruling of the court.)

Cross-examination.

By Mr. LUCE:

Q. Mr. Pauly, was there any evidence connected with this certificate of the manner or method in which it came into the possession of the bank?

A. No.

By Judge WORKS: It is not claimed that it was taken as security or anything of that kind.

FRED. T. HILL, being recalled upon behalf of plaintiff, testified as follows:

WITNESS: I have now in my possession the first ledger that shows the first dividend that was paid by the California savings bank. There were two dividends paid. The first was December 11th; it was five per cent. on the twenty-five thousand dollars capital stock for six months. The California National bank received $750, being dividend on 1,500 shares. I paid those dividends myself.

35 The next dividend was declared in January, 1891, and my recollection is that the dividend was paid and the stockholders stood just as they did in the first dividend. The certificate of stock which you now hand me was the one issued for the three we spoke of this morning, and the endorcements is in my handwriting; that is the original $10,000 a share assessed when the bank opened. The whole assessment was paid to me as a lump and

not as each director gave it. I do not know that the California National bank paid any of the assessment. Nine hundred and ninety shares of stock was delivered to the California National bank by me.

Cross-examination.

By Mr. LUCE:

Q. Now, Mr. Hill, will you state to the court what you know relative to the issuance of this stock, beginning with the first issuance of it; everything in relation to it; when it was first issued and what occurred up to the issuance of that certificate of stock?

A. The original issue was five certificates of $500 each, issued to J. W. Collins, S. G. Havermale, D. D. Dare, William Collier, and H. F. Norcross. That was the capital stock. On September 10th, 1890, the 500 shares that stood in William Collier's name and the 500 shares that stood in H. F. Norcross's name were handed in for cancelling and new certificates issued. The original issue was January 13th of 1890. The certificates that stood in the name of H. F. Norcross were taken up, and certificates numbers 8, 9, and 10 were issued in the name of J. W. Collins, cashier of the California National bank, on September 10th. Mr. Norcross and Mr. Col-
36 lier retained five shares each, and that would leave 990 shares in the name of J. W. Collins, cashier. On January 2nd, 1891, these certificates, 6, 8, and 10, amounting to 990 shares, were cancelled by the issuance of certificate number 12, in one certificate of 990 shares, to the California National bank. Mr. Collins delivered up the certificate which he held as cashier and ordered me to issue them to the California National bank, and I took them in and attached them to the old stubs and issued new certificates, as he told me to do. I put in the words California National bank into that certificate. The certificate- to Mr. Norcross or to Mr. Collier were none of them delivered, and there is no endorsements on the first certificates to Mr. Norcross or to Mr. Collier when they were returned for cancellation.

By Mr. WORKS:

Q. Mr. Hill, at the time of the original issue of stock to Mr. Havermale and Mr. Collins and these other parties, how were they connected, if at all, with the California National bank?

A. I think all of them, with the exception of Mr. Norcross, were officers of the national bank. Mr. Dare was vice-president, Mr. Collier president, Mr. Collins cashier, and Mr. Havermale a director. They were all members of the directory of the bank, except Mr. Norcross, during all the changes and issues that I have testified to.

Plaintiff and defendant, California National Bank, then rested; whereupon the court ordered findings and decree in favor of plain-
37 tiff and against defendant, The California National Bank, to be prepared and entered, and a findings and decree were prepared and entered accordingly.

Specification of Particulars in which the Evidence was Insufficient to Sustain the Findings of the Court Herein.

First. That third finding is contrary to the evidence in that it affirmatively appears that there was nothing due and owing to the plaintiff from defendant at the time of making the deposit in the California savings bank.

Second. The seventh finding is unsustained by the evidence in that it appears affirmatively that it is not claimed by plaintiff that the said stock of the savings bank was taken by the defendant, California National Bank, as security for any debt or anything of that kind.

Errors of Law Occurring at the Trial and Excepted to by the Defendant, The California National Bank.

First. The court erred in overruling the defendant's objection to the introduction of the certificate of stock claimed to have been issued by the California savings bank to the California National bank for that it had not been shown that any authority had been given by the California National bank or its board of directors for taking, receiving, or holding the stock in question, it having been admitted that it was not taken as security or in the ordinary course of business of the bank; it further appearing that the California National bank, a banking corporation under the laws of the United States, could not in law become a stockholder or incorporator in any other corporation or in the California savings bank, another and different corporation.

Second. That findings three and seven, to the effect that
38 The California National Bank, this defendant, was a stockholder in the California savings bank, is not justified by the evidence, for that it does not appear from the evidence that any authority was given by the board of directors of the California National bank for its president, cashier, or any of its officers to take, hold, or o-n any stock in the California savings bank, or any evidence tending to show that such stock was taken in the pursuance of its legitimate business or in the collection of claims held by it otherwise, and that it was affirmatively admitted, as appears from evidence, that it was not held or taken as security for payment of a debt due the bank. Further, that said findings numbers three and seven, so far as they affect this defendant, were against law in that the California National bank, being a corporation under the banking laws of the United States of America, could not become a stockholder or incorporator in the California savings bank, another and a different corporation.

Third. That the judgment of the court against this defendant is against law in that by the laws governing defendant banking corporations defendant could become liable as a stockholder or incorporator in another and a different corporation or be liable for the debts and obligations of said other corporation.

Fourth. The court erred in allowing plaintiff, over the objection of the defendant, to introduce in evidence the certificate of stock for 990 shares issued by the California savings bank to the California National bank.

Fifth. The court erred in holding that defendant, Cali-
39 fornia National Bank, is or ever was a stockholder of the California National bank and was liable in the sum of $18,807.52 or in any sum whatever.

Sixth. The court erred in rendering any decision in favor of plaintiff and against defendant.

JAMES E. WADHAM,
Attorney for California National Bank.

The foregoing statement is hereby agreed upon and is correct.

WORKS & WORKS,
Attorneys for Plaintiff.
JAMES E. WADHAM,
Attorney for California National Bank.

I hereby certify that the foregoing statement is allowed and settled and is correct.

W. L. PIERCE,
Judge of said Superior Court.

Service of within admitted by copy this 15th day of October, 1892.

WORKS & WORKS,
Attorneys for Plaintiff.

Endorsed: Filed Oct. 26th, 1892. C. W. Thompson, clerk, by E. J. Ensign, deputy.

From the Minutes of the Court, Nov. 9th, 1892.

Court meets 10 a. m.
Present: W. L. Pierce, judge.

Title of Cause.

40 Come now the parties, by counsel; and the motion of the defendant, The California National Bank, for a new trial, heretofore filed, is argued, submitted, and by the court denied; to which ruling said defendant excepts.

Notice of Appeal.

(Title Court & Cause.)

To plaintiff above named and Messrs. Works & Works and W. H. Fuller, his attorneys of record:

You and each of you will please take notice that the defendant, California National Bank, hereby appeals to the supreme court of the Stat of California from a judgment in this action of this court

in favor of plaintiff and against defendant, California National Bank, in the sum of eighteen thousand eight hundred and seven and fifty-two one-hundredth dollars and costs, therein entered September 8th, 1892, and from the whole thereof.

And also from the order of said court denying the defendant California National Bank's motion for a new trial in this action, made and entered in the minutes of the said court on the 9th day of November, 1892.

Dated December 28th, 1892.

Respectfully yours, JAMES E. WADHAM,
Attorney for Defendant, California National Bank.

The undertaking on appeal provided for in sections 940 and 941 of the Code of Civil Proceedure is hereby waived, and this appeal shall be perfected by the giving of the foregoing notice.

41 W. H. FULLER AND
WORKS & WORKS,
Attorneys for Plaintiff.
JAMES E. WADHAM,
Attorney for Defendant, California National Bank.

Stipulation.

It is hereby stipulated that the foregoing transcript contains full, true, and correct copies of the judgment-roll and notice of appeal, which are of record in the above-entitled cause, and that an undertaking on appeal has been duly and regularly waived, and that said judgment was duly entered before said appeal was taken.

Dated this 12th day of January, 1893.

W. H. FULLER,
WORKS & WORKS,
Attorneys for Plaintiff & Respondent.
JAMES E. WADHAM,
Attorney for Defendant & Appellant, California National Bank.

42 Whereupon the supreme court of California, having heard the cause argued by Mr. James E. Wadham for the appellant, and Messrs. Works and Works and Mr. W. H. Fuller for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment and order of the superior court of the county of San Diego, appealed from in this action, be in all things affirmed.

Therefore it is considered that the said judgment and order be in all things affirmed and stand in full force, strength, and effect.

And on the first day of March, A. D. 1894, was filed the following opinion of the supreme court of California thereon:

43 HARRISON, *J.*:

During the year 1891 the plaintiff deposited with The California Savings Bank, one of the defendants herein, different sums of money, for which the said defendant issued to him its several certificates of deposit, amounting in the aggregate to $45,000. On the 12th of November, 1891, the plaintiff demanded of the savings bank payment of the amount of said certificates, and upon its refusal brought this action, making the other defendants parties to the action for the purpose of recovering from them their proportion of said indebtedness as stockholders in the California savings bank. Judgment was recovered against the savings bank for the full amount of the claim and against the other defendants for their respective proportions thereof as such stockholders. The California National Bank, one of the defendants, has appealed upon the ground that, by virtue of the statutes under which it is organized, it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far *ultra vires* that it cannot be made liable for any portion of the indebtedness of the corporation. The California savings bank was organized January 13, 1890. September 10, 1890, 990 shares of its capital stock were issued to J. W. Collins, cashier of the California National bank, and on January 2, 1891, the certificates representing these shares were canceled and one certificate therefor was issued to the California National bank, and was thereafter held by it until after the commencement of this action. During this period two dividends upon this stock were paid by the savings bank to the appellant. The
44 defense of *ultra vires* is looked upon by courts with disfavor whenever it is presented for the purpose of avoiding an obligation which a corporation has assumed merely in excess of the powers conferred upon it and not in violation of some express prohibition of the statute. Courts are inclined to treat the corporation as estopped from setting up this defense in all cases when it has received and retains the benefit of the transaction and seeks by this plea to avoid its correlative obligation. In Evans *v.* Bailey, 66 Cal., 112; 4 Pac., 1089, an action was brought against the stockholders of the California Fruit & Meat Shipping Company to recover from them their respective proportions of certain indebtedness to the plaintiff of that corporation. One of these defendants was the People's Ice Company, another corporation, which held a thousand shares of the capital stock of the corporation debtor, and to its objection that it was *ultra vires* for it to hold stock in another corporation it was held that as it did not appear that it was not within the scope of its power to hold stock in the defendant corporation under any circumstances or for any purpose, and as the circumstances under which it had acquired the stock were not shown, the defense could not be maintained. There is no provision in the statute by which a national bank is expressly prohibited from becoming a stockholder in another corporation, and while it may be conceded that its subscription to the shares of another corporation

would be so far in excess of the powers conferred by the statute under which it is organized that its executory contract therefor would not be enforced, it by no means follows that if such
45 contract is executed and it has been registered as such stockholder it is not entitled to a voice in its corporate management or to its share of the corporate earnings while the corporation is in existence or of its assets upon a dissolution thereof. It may take shares in another corporation as collateral security for a loan made by it, and if the loan is not paid it may become the owner of those shares and have them registered in its name upon the books of that corporation, and in such a case it is subject to the same liabilities as any other stockholder. In Bank *v.* Case, 99 U. S., 628, the bank had become a stockholder in another corporation under such circumstances and it was held to be liable for its proportion of the debts of the corporation in which it had been a stockholder, although it had transferred the stock to one of its clerks for the purpose of avoiding such liability. As the appellant herein could have taken the stock of the savings bank in satisfaction of a loan for which it had been pledged to it as security, it was within the scope of its power to become a stockholder therein, so that it cannot be said that it was prohibited by the statute from becoming such stockholder. Having caused itself to be registered upon the books of the corporation as a stockholder, any person dealing with the corporation would be justified in assuming that it had become such stockholder by virtue of a transaction within its power, rather than in violation of the laws of its creation, and, so long as it held itself out as such, it ought not to be permitted to defend against its liability as such stockholder by showing that it had become such in violation of law. "Strangers are presumed to know the law of
46 the land, and they are bound, when dealing with corporations, to know the powers conferred by their charter. These are open to their inspection, and it is easy to determine whether the act is within the scope of the general powers conferred for that purpose, but they have no access to the private papers of the corporation or to the motives which govern directors and stockholders, and no means of knowing the purposes for which an act that may be lawful for some purpose is done. The very fact that the appointed officers of the corporation assume to do an act in the apparent performance of their duty which they are authorized to perform for the lawful purposes of the corporation is a representation to those dealing with them that the act performed is for a proper purpose, and such is the presumption of the law, and upon this presumption strangers having no notice in fact of the unlawful purpose are entitle- to rely." Ditch Co. *v.* Zellerbach, 37 Cal., 587. The appellant has not repudiated the agreement under which it received the stock, but still retains it, and, so far as is shown by the record, claims to be the owner of it and to share in all the earnings and assets of the corporation. During the period that it has claimed to be such owner it has received dividends out of the assets of the savings bank, and to that extent diminished the corporate

property which otherwise might have been appropriated in satisfaction of the plaintiff's claim. See Mitchell *v.* Beekman, 64 Cal., 117; 28 Pac., 110. Having had the benefit of the transaction, and still enjoying its fruits, it is estopped from denying a liability
47 which is correlative to such benefit and fruits and dependent thereon. See Morse, Banks, sec. 735. The judgment and order are affirmed.

We concur.

GAROUTTE, *J.*
PATERSON, *J.*

48 On the first day of December, A. D. 1894, was filed the following citation, with proof of service:

UNITED STATES OF AMERICA, *ss:*

——— ———, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein The California National Bank is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 16th day of November, in the year of our Lord one thousand eight hundred and ninety-four.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

On this 27th day of November, in the year of our Lord one thousand eight hundred and ninety-four, personally appeared before me, the subscriber, James E. Wadham, and makes oath that he delivered a true copy of the within citation to William H. Fuller, attorney for defendant in error.

——— ———.

Sworn to and subscribed the 27th day of November, A. D. 1894.

[NOTARY SEAL.] C. F. HOLLAND,
Notary Public in and for San Diego County, California.

Due service of the within admitted by copy this 26th day of November, 1894.

WILLIAM H. FULLER,
Attorney for Defendant in Error.

Endorsed: Filed Dec. 1st, 1894. L. H. Brown, clerk, by Geo. A. McCalvy, deputy.

49 On the first day of December, 1894, was filed the following assignment of errors:

50 The Supreme Court of the United States.

CALIFORNIA NATIONAL BANK, Plaintiff in Error,
against
NAT. KENNEDY, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, on the twenty-second day of November, in the year of our Lord one thousand eight hundred and ninety-four, comes the said California National bank, by Edward Winslow Paige, its attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

1. The court erred in holding that the California National bank was a stockholder of the California savings bank.

2. The court erred in holding that Nat. Kennedy had a right to assume that the California National bank had acquired the stock of the California saving bank which stood in its name in the manner permitted by the Revised Statutes of the United States, and in making his deposits to rely upon that assumption.

3. The cashier had no power or authority to transfer stock of the California savings bank which stood in the names of human beings into the name of the California National bank, and thereby make the latter bank a stockholder of the former one, and the court
51 erred in holding that he could.

4. The California National bank could not, under the Revised Statutes of the United States, take stock of and become a stockholder in the California savings bank, the stock not having been taken as security for a loan or debt or anything of that kind, and the court erred in holding that it could.

5. Nat. Kennedy had no right to assume when he made his deposits that the California National bank had got the stock of the California savings bank in a way permitted by the Revised Statutes of the United States, inasmuch as it did not appear that he then knew anything about it, not even that the former bank had any such stock, and the court erred in holding that he had the right to so assume.

6. The court erred in holding that Nat. Kennedy had the right to recover under the first count of the complaint against the California National bank, whereas it should have held in favor of the latter, dismissing the complaint as to that count.

7. The court erred in holding that Nat. Kennedy had the right to recover under the second count in the complaint against the California National bank, whereas it should have held in favor of the latter, dismissing the complaint as to that count.

8. The court erred in holding that Nat. Kennedy had the right to recover under the third count of the complaint against the California National bank, whereas it should have held in favor of the latter, dismissing the complaint as to that count.

52 9. The court erred in holding that Nat. Kennedy had the right to recover under the fourth count of the complaint

against the California National bank, whereas it should have held in favor of the latter, dismissing the complaint as to that count.

10. The court erred in holding that Nat. Kennedy had the right to recover under the fifth count of the complaint against the California National bank, whereas it should have held in favor of the latter, dismissing the complaint as to that count.

11. The court erred in rendering judgment in favor of Nat. Kennedy and against the California National bank for $18,807.52, whereas it should have rendered judgment in favor of the latter, dismissing the complaint as to it.

EDWARD WINSLOW PAIGE,
Attorney for The California National Bank,
Plaintiff in Error, 44 Cedar Street, New York City.

53 STATE OF CALIFORNIA, }
Supreme Court, Clerk's Office. }

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that I have compared the annexed copy of the record and proceedings of the opinion of the supreme court of California, of the citation and proof of service of the same, and of the assignment of errors with the originals on file in this office, and that the same are correct transcripts therefrom and of the whole of said originals, and that the writ of error annexed is the original writ served upon me.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of San Francisco, this eleventh day of December, A. D. 1894.

[Seal Supreme Court of California.]

L. H. BROWN,
Clerk Supreme Court,
By GEO. A. McCALVY,
Dep'ty Clerk.

Endorsed on cover: Case No. 15,757. California supreme court. Term No., 206. The California National Bank, plaintiff in error, *vs.* Nat Kennedy. Filed December 26, 1894.

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CLERK.

Supreme Court of the United States.

NUMBER 206 OF OCTOBER TERM, 1896.

THE CALIFORNIA NATIONAL BANK,
Plaintiff in Error,

against

NAT. KENNEDY.

Brief for the Plaintiff in Error.

EDWARD WINSLOW PAIGE,
Of Counsel.

Supreme Court of the United States.

NUMBER 206 OF OCTOBER TERM, 1896.

THE CALIFORNIA NATIONAL BANK,
Plaintiff in Error,

against

NAT. KENNEDY.

BRIEF FOR THE PLAINTIFF IN ERROR.

ABSTRACT OR STATEMENT OF THE CASE.

FIRST HEAD.—Nature of the action.

This is a writ of error bringing up a judgment of the Supreme Court of California, which had affirmed a judgment of the Superior Court of San Diego County—a judgment for money—got by the defendant in error against the plaintiff in error.

The defendant in error had deposited monies with a savings bank named "The California Savings Bank."

It seems that in California a savings bank has stock, and the courts below have held that stockholders of a savings bank in California are liable for its debts.

The details of this will be given under the "THIRD HEAD."

The case was tried to the court, and the court found as a fact, that the defendant in error, as the city treasurer of the city of San Diego, had on the second of March,

1891, the fourteenth of July, 1891, and the fourth of November, 1891, deposited with the California Savings Bank sums of money aggregating $45,500 (Record, p. 14), and further:

"That at the times of making each and all of said de-
"posits and at all the times mentioned in plaintiff's
"complaint * * * the defendant The California
"National Bank was one of the stockholders and was the
"owner of nine hundred and ninety-nine* of said shares
"of stock" (pp. 14–15).

And it gave judgment against The California National Bank for $18,807.52—that sum being supposed to be the same proportion of the $45,500 which the nine hundred and ninety shares is of the total number of the shares of the stock of the savings bank.

This judgment having been affirmed by the Supreme Court of California, a writ of error has brought the record here.

SECOND HEAD: Evidence from which the trial court found the fact that the national bank was a stockholder in the savings bank.

The capital stock of the savings bank was of the par of two hundred and fifty thousand dollars, divided into twenty-five hundred shares of one hundred dollars each.

The original issue of stock was 13th January, 1890, and consisted of five hundred shares each to J. W. Collins, S. G. Havermale, D. D. Dare, William Collier and H. F. Norcross (pp. 17–20).

It is quite apparent from the evidence that this stock was not paid up, *but that, at the utmost, only fifty thousand dollars—that is, twenty per cent.—was paid upon it* (p. 19).

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* *Sic.*—Mistake for nine hundred and ninety.

Collins was then the cashier of the national bank, Collier was its president, and Havermale and Dare were both directors.

Norcross, so far as appears, had nothing to do with the national bank.

When the savings bank opened, an assessment of ten thousand dollars upon *each share* was made and paid.

> "Each share" is supposed to mean each of the original blocks of five hundred shares. The exact words used are: "That is the original $10,000 a share assessed "when the bank opened. The whole assessment was paid to me" (cashier of savings bank) "as a lump and not as each director gave it. I do not know that "the California National Bank paid any of the assessment" (pp. 19-20).

Matters remained in this way until the tenth of September, 1890—on that day the certificates, for five hundred shares each, issued to Collier and Norcross, were cancelled by the cashier and three certificates for nine hundred and ninety shares in the aggregate were issued in the name of "J. W. Collins, cashier of the California "National Bank." "*The certificate to Mr. Norcross or* "*to Mr. Collier were none of them delivered, and there is* "*no endorsements on the first certificates to Mr. Norcross* "*or to Mr. Collier when they were returned for cancel-*"*lation*" p. 20).

On the second of January, 1891, Collins surrendered these three certificates and took one for nine hundred and ninety shares, in the name of The California National Bank (p. 18). This certificate was found in the banking house by Mr. Pauly, when he took possession as receiver.

It was admitted that this stock was not taken *as security*, "or anything of that kind."

> "By Judge Works: It is not claimed that it was taken as security or anything "of that kind" (p. 19), and the statement was stipulated "as correct" and certified by the court to be correct (p. 22).

The savings bank suspended on the twelfth of November, 1891 (p. 17).

Mr. Pauly qualified as Receiver of the national bank on the twenty-ninth of November, 1891 (pp. 18–19).

While the stock stood in the name of Collins, cashier, two dividends were paid and received by the national bank, one of $750. The cashier of the savings bank says this was a dividend on *fifteen hundred* shares of stock (p. 19); and it plainly was so. This was eleventh of December, and the other, which he thinks was the same in amount, in January, 1891 (pp. 18, 19).

The city monies were not actually deposited by the defendant in error on the second of March. *They were already there.* The amounts on deposit were simply figured up on that day and certificates given for the aggregate. *The monies had been on deposit for some time before. How long before does not appear* (p. 18).

Sections 5136 and 5137 of the Revised Statutes are as follows:

"SEC. 5136. Upon duly making and filing articles of "association and an organization certificate, the associa- "tion shall become, as from the date of the execution of "its organization certificate, a body corporate, and as "such, and in the name designated in the organization "certificate, it shall have power—

"FIRST. To adopt and use a corporate seal.

"SECOND. To have succession for the period of twenty "years from its organization, unless it is sooner dissolved

" according to the provisions of its articles of association,
" or by the act of its shareholders owning two-thirds of
" its stock, or unless its franchise becomes forfeited by
" some violation of law.

" THIRD. To make contracts.

" FOURTH. To sue and be sued, complain and defend,
" in any court of law and equity, as fully as natural
" persons.

" FIFTH. To elect or appoint directors, and by its
" board of directors to appoint a president, vice-president,
" cashier, and other officers, define their duties, require
" bonds of them and fix the penalty thereof, dismiss such
" officers or any of them at pleasure, and appoint others
" to fill their places.

" SIXTH. To prescribe, by its board of directors, by-
" laws not inconsistent with law, regulating the manner
" in which its stock shall be transferred, its directors
" elected or appointed, its officers appointed, its property
" transferred, its general business conducted, and the
" privileges granted to it by law exercised and enjoyed.

" SEVENTH. To exercise by its board of directors, or
" duly authorized officers or agents, subject to law, all
" such incidental powers as shall be necessary to carry on
" the business of banking; by discounting and negotiat-
" ing promissory notes, drafts, bills of exchange, and
" other evidences of debt; by receiving deposits; by buy-
" ing and selling exchange, coin, and bullion; by loaning
" money on personal security; and by obtaining, issuing,
" and circulating notes according to the provisions of this
" Title.

" But no association shall transact any business except
" such as is incidental and necessarily preliminary to its
" organization, until it has been authorized by the Comp-
" troller of the Currency to commence the business of
" banking.

"SEC. 5137. A national banking association may pur-
"chase, hold, and convey real estate for the following pur-
"poses, and for no others:

"FIRST. Such as shall be necessary for its immediate
"accommodation in the transaction of its business.

"SECOND. Such as shall be mortgaged to it in good
"faith by way of security for debts previously contracted.

"THIRD. Such as shall be conveyed to it in satisfaction
"of debts previously contracted in the course of its deal-
"ings.

"FOURTH. Such as it shall purchase at sales under
"judgments, decrees, or mortgages held by the association,
"or shall purchase to secure debts due to it.

"But no association shall hold the possession of any
"real estate under mortgage, or the title and possession
"of any real estate purchased to secure any debts due to
"it, for a longer period than five years."

THIRD HEAD: The liability of a stockholder in California.

There is in California a general statute, applicable to all corporations having stock, which is as follows:

CIVIL CODE (Amendments to the Codes 1875–76, p. 73).

322. *Stockholders liable for debts.*

"SEC. 322. Each stockholder of a corporation is indi-
"vidually and personally liable for such proportion of its
"debts and liabilities as the amount of stock or shares
"owned by him bears to the whole of the subscribed capi-
"tal stock or shares of the corporation, and for a like
"proportion only of each debt or claim against the cor-
"poration. Any creditor of the corporation may institute
"joint or several actions against any of its stockholders
"for the proportion of his claim, payable by each, and in
"such action the court must ascertain the proportion of

" the claim or debt for which each defendant is liable,
" and a several judgment must be rendered against each,
" in conformity therewith. If any stockholder pays his
" proportion of any debt due from the corporation, in-
" curred while he was such stockholder, he is relieved from
" any further personal liability for such debt; and if an
" action has been brought against him, upon such debt, it
" shall be dismissed, as to him, upon his paying the costs,
" or such proportion thereof as may be properly charge-
" able against him. *The liability of each stockholder is*
" *determined by the amount of stock or shares owned by*
" *him at the time the debt or liability was incurred;* and
" such liability is not released by any subsequent transfer
" of stock. The term 'stockholder,' as used in this sec-
" tion, shall apply not only to such persons as appear by
" the books of the corporation to be such, but, also, to
" every equitable holder of stock, although the same
" appear on the books in the name of another, and, also,
" to every person who has advanced the installments or
" purchase money of stock in the name of a minor, so long
" as the latter remains a minor; and, *also, to every guard-*
" *ian or other trustee who voluntarily invests any trust*
" *funds in the stock.* Trust funds in the hands of a
" guardian or trustee shall *not* be liable under the provis-
" ions of this section by reason of any such investment,
" nor shall the person for whose benefit the investment is
" made be responsible in respect to the stock, until he
" becomes competent and able to control the same; *but*
" *the responsibility of the guardian or trustee making the*
" *investment shall continue until that period. Stock held*
" *as collateral security, or by a trustee, or in any other*
" *representative capacity, does* NOT *make the holder*
" *thereof a stockholder* within the meaning of this sec-
" tion, except in the cases above mentioned, so as to charge
" him with any proportion of the debts or liabilities of the

"corporation; *but the pledgor, or person, or estate rep-*
"*resented, is to be deemed the stockholder, as respects*
"*such liability.* In corporations having no capital
"stock, each member is individually and personally liable
"for his proportion of its debts and liabilities, and simi-
"lar actions may be brought against him, either alone or
"jointly with other members, to enforce such liability as
"by this section may be brought against one or more
"stockholders, and similar judgments may be rendered.
"The liability of each stockholder of a corporation formed
"under the laws of any other state or territory of the
"United States, or of any foreign country, and doing busi-
"ness within this State, shall be the same as the liability
"of a stockholder of a corporation created under the Con-
"stitution and laws of this State."

Italics and capitals are mine of course.

This act, so far as the part of it which may be relied upon to uphold the judgment below is concerned, is taken quite literally from a New York statute of 1849, a statute which has been construed by the courts.

The text of these two statutes is as follows:

CONSTITUTION OF NEW YORK, 1846.

ARTICLE VIII., SECTION 7.

"The stockholders in every corpo-
"ration and joints-tock association for
"banking purposes, issuing bank
"notes or any kind of paper credits,
"to circulate as money, after the first
"day of January, one thousand eight
"hundred and fifty, shall be individ-
"ually responsible, to the amount of
"their respective share or shares of
"stock in any such corporation or
"association, for all its debts and lia-
"bilities of every kind, contracted
"after said first day of January, one
"thousand eight hundred and fifty."

THE CODES AND STATUTES OF CALIFORNIA.

CIVIL CODE.

§ 322. STOCKHOLDERS LIABLE FOR DEBTS.

LAWS OF NEW YORK, 1849,
CHAPTER 226.

"§ 1. Whenever default shall be "made in the payment of any debt or "liability, contracted after the first "day of January, one thousand eight "hundred and fifty, by any corpora- "tion or joint stock association for "banking purposes, issuing bank "notes or any kind of paper credits "to circulate as money, after the first "day of January, one thousand eight "hundred and fifty, the *stockholders* of "such corporation *or association* shall "be individually responsible, *equally "and ratably*, such responsibility to be "enforced as hereafter provided, and "in no other manner, for the amount "of such debt or liability, with in- "terest, to the extent of their respect- "ive shares of stock in any such "corporation or association, as herein- "after provided.

"SEC. 322. Each *stockholder* of a "corporation is individually and per- "sonally liable for such proportion "of its debts and liabilities as the "amount of stock or debts owned by "him bears to the whole of the sub- "scribed capital stock or shares of the "corporation, and for a like proportion "only of each debt or claim against "the corporation. Any creditor of "the corporation may institute joint "or several actions against any of its "stockholders for the proportion of "his claim, payable by each, and in "such action the Court must ascer- "tain the proportion of the claim or "debt for which each defendant is "liable, and a several judgment must "be rendered against each, in con- "formity therewith. If any stock- "holder pays his proportion of any "debt due from the corporation, in- "curred while he was such stock- "holder, he is relieved from any "further personal liability for such "debt; and if an action has been "brought against him, upon such "debt, it shall be dismissed, as to him, "upon his paying the costs, or such "proportion thereof as may be prop- "erly chargeable against him. The "liability of each stockholder is de- "termined by the amount of stock or

	"shares owned by him at the time the
	"debt or liability was incurred; and
	"such liability is not released by any
	"subsequent transfer of stock.
"§. The term 'stockholder,' as	"The term 'stockholder,' as used
"used in this *act*, shall apply not	"in this *section*, shall apply not only
"only to such persons as appear by	"to such persons as appear by the
"the books of the corporation *or as-*	"books of the corporation
"*sociation*	
"to be such, but also to every equi-	"to be such, but, also, to every equi-
"table owner of stock, although the	"table owner of stock, although the
"same *may* appear on such books in	"same appear on the books in
"the name of another *person;* and	"the name of another, and,
"also to every person who *shall*	"also, to every person who *has* ad-
"*have* advanced the installments or	"vanced the installments or pur-
"purchase money of *any* stock in	"chase money of stock in the
"the name of *any person under*	"name of *a minor*,
"*twenty-one years of age, and while*	"*so long as the latter* remains a
"*such person* remains a minor, *to the*	"minor;
"*extent of such advance;* and also to	" and also to
"every guardian or other trustee	"every guardian or other trustee
"who *shall* voluntarily invest any	"who voluntarily invests any
"trust funds in such stock; *and no*	"trust funds in the stock. Trust
"trust funds in the hands of *such*	"funds in the hands of *a* guardian
"guardian or trustee shall be *in any*	"or trustee shall *not* be liable under
"*way* liable under the provisions of	"the provisions of this section
"this act, by reason of any such in-	"by reason of any such investment,
"vestment, nor shall the person for	"nor shall the person for whose
"whose benefit *any such* investment	"benefit the investment *is* made be
"*may be* made, be responsible in	"responsible in respect to *the* stock,
"respect to *such* stock, until *thirty*	"until
"*days after the time when such per-*	" *he*
"*sons, respectively,* become compe-	" becomes compe-
"tent and able to control *and dispose*	"and able to control
"*of* the same; but the guardian or	" the same; but *the responsibility*
"*other* trustee making such invest-	"*of* the guardian or trustee making
"ment *as aforesaid,* shall continue	"the investment shall continue
"*responsible as a stockholder* until	" until
"*such responsibility devolves upon the*	
"*person beneficially interested therein;*	
"*and in respect to stock held by a*	"that period. Stock held as collat-
"*guardian or other trustee, under*	"eral security, or by a trustee, or in
"*a transfer of the same by a third per-*	"any other representative capacity,
"*son, or under positive directions by a*	"does not make the holder thereof a
"*third person for such investment, the*	"stockholder within the meaning of

" *person making such transfer, or giv-*
" *ing such directions, and his executors*
" *and administrators, shall, for the*
" *purposes of this act, be deemed a*
" *stockholder, and the estate of such*
" *person, if he be deceased, shall be re-*
" *sponsible for the debts and liabilities*
" *chargeable on such stock according to*
" *the provisions of this act.*"

" § 3. The persons who shall be
" stockholders of any corporation or
" association described in the first
" section of this act, at the time of
" contracting any debt or liability
" by such corporation or association,
" shall be responsible therefor, as
" declared in the said first section,
" but shall be exonerated from such
" responsibility in respect to any
" stock which shall have been trans-
" ferred, previous to any default in
" the payment of such debt or lia-
" bility, on the books of such cor-
" poration or association, to any resi-
" dent of this state, of full age, in
" good faith and without any intent
" to evade such responsibility; and
" every assignee of any stock so
" transferred previous to such de-
" fault, shall be responsible for debts
" and liabilities to extent of such
" stock, in the same manner as if he
" had been the owner at the time of
" contracting such debt or liability,
" with the same exception in his
" favor, in respect to any stock trans-
" ferred by him as herein provided;
" and the same rule of responsibility
" shall apply to each subsequent
" assignee."

" this section, except in the cases
" above mentioned, so as to charge
" him with any proportion of the
" debts or liabilities of the corpora-
" tion; but the pledgor, or person, or
" estate represented, is to be deemed
" the stockholder, as respects such
" liability."

" 324. *Transfer of shares.*

" SEC. 324. Whenever the capital
" stock of any corporation is divided
" into shares, and certificates there-
" for are issued, such shares of
" stock are personal property, and
" may be transferred by indorse-
" ment by the signature of the pro-
" prietor, or his attorney or legal rep-
" resentative, and delivery of the
" certificate; but such transfer is not
" valid, except between the parties
" thereto, until the same is so entered
" upon the books of the corporation
" as to show the names of the parties
" by and to whom transferred, the
" number or designation of the
" shares, and the date of the trans-
" fer."

It was the
Constitution of New York—of 1846—which established free trade in banking.
Article VIII, Section 4:
" The legislature shall have no power to pass any act granting any special
" charter for banking purposes; but corporations or associations may be formed for
" such purposes under general laws."

The New York statute was construed in the *Matter of the Empire City Bank*, 18 N. Y., 199, where the Court said, by Judge Denio (p. 223):

"1. The United States Fire Insurance Company and " several others appealed because they had been charged " as stockholders in respect to stock standing in their " names, but which, as they alleged and proved before the " referee, they held only by way of hypothecation as se- " curity for money loaned. The referee charged the debtors " who had transferred the stock; but the special term " reversed that determination, and made the apportion- " ment against the parties in whose names it stood. In re- " gard to two of the persons thus charged, Struthers and " Pearsall, the debts had been paid and the scrip returned " to the borrowers; but the evidence tended to show that " this occurred after the bank had stopped payment, and " after these proceedings had been commenced. It had " never been re-transferred on the books of the bank. It " has been recently decided in this court, in a case under " the general manufacturing act of 1811, but which was " in other respects precisely like the present, that the " creditor, to whom stock hypothecated had been trans- " ferred on the company's books, was the person to be " charged under the liability clause contained in that act. " (Roosevelt *v.* Brown, 1 Kern., 148.) There is no legal " distinction between the words 'members of the com- " pany,' used in the act of 1811, and the term 'stock- " holders,' employed in the constitution and the act of " 1849. But there are other parts of the last mentioned " act which must be considered. It is declared that the " term 'stockholder,' as used in the act, 'shall apply not " only to such persons as appear by the books of the cor- " poration or association to be such, but also to every " equitable owner of stock, although the same may appear " on such books in the name of another person.' (§ 2.)

"The persons who were stockholders when the debt was "contracted are the ones to be charged; but this liability "is shifted to the purchasers, where the stock is trans- "ferred on the books, *bona fide*, prior to a default in "paying the debt. (§ 3.) Banks are bound under a "penalty to keep a list of their stockholders and a state- "ment of the registered transfers, and to exhibit them "when required. The books containing these lists and "statements are made presumptive evidence of their con- "tents, but the presumption may be repelled. (§ 4.)

"The debts left unpaid, when the bank failed, were "contracted either while these parties held the stock or "when it was held by some former proprietors, so that no "question arises under that portion of the third section. "Nor does it appear to me that making the books pre- "sumptive evidence, with the qualifications mentioned, "is material. As to these parties the books of this bank "are true, for the transfers in question were actually "made, as there mentioned, with the assent of the parties. "The presumption is not repelled, but confirmed. If the "parties who complain can escape from responsibility, it "must be on the ground that the debtors who hypothe- "cated the stock are the equitable owners, within the in- "tention of the second section, and the parties to be "charged in exoneration of the creditors assessed by the "special term.

"The legislature manifestly intended to enforce the "constitutional provision. This is stated in the terms in "the title of the act, and is apparent from its provisions. "We are not at liberty to construe the second section in "such a manner as to exempt from liability any parties "whom the constitution has made liable, but there is not "the same objection against holding that the statute com- "prehends others not made liable by the constitution. "All those who are properly termed stockholders must

" contribute to the extent declared by the constitution;
" and in addition to this the legislature has power to in-
" clude parties equitably interested in the stock, but who
" were not actually stockholders. Stockholders who have
" transferred their shares by way of hypothecation cer-
" tainly retain an equitable interest in them, and hence
" are in some sense equitable owners; but the parties to
" whom the stock was transferred, and in whose name it
" is registered, are the stockholders. This was decided
" in a well-considered case in the former Supreme Court
" shortly before the constitution was adopted. (Adderly
" *v.* Storm, 6 Hill, 624.) And when the constitutional
" convention came to attach a liability to stockholders of
" banks, it may be fairly concluded that the term was used
" in the sense which the court had affixed to it. The act
" does not declare that persons appearing on the books
" of the corporation to be stockholders shall be exempt
" from liability when another person is the equitable
" owner. The enactment is, that the term stockholder is
" to apply, *not only* to those appearing by the books to
" be stockholders, *but also* to every equitable owner of
" stock standing in the name of another. If the referee
" had assessed both parties to the hypothecation, where
" the stock had been registered in the name of the lender
" of money, an argument of considerable force could be
" made in favor of the decision. The creditors of the
" bank would be more fully protected by having the
" responsibility of both parties; and the execution could
" be levied upon the borrower, who ought, in equity, as
" between himself and the lender, to be primarily charged,
" if he possessed property out of which the charge could
" be satisfied. But neither party has contended for that
" rule, and we have only to decide whether the lenders,
" to whom the stock had been transferred on the books,
" were legally chargeable. I am of opinion that they are

" fairly included in the constitutional provision, and that " the legislature has not attempted to establish a different " rule. If the statute does not admit of a joint judgment " against both parties to an hypothecation, and if the " party registered as a stockholder must be exonerated " whenever an equitable owner of the same stock is " charged, then I am of opinion that the provision charg- " ing the equitable owner should be limited to cases where " the party who is registered as the owner is merely a " nominal holder. A trustee, legally authorized to invest " the funds of another in bank stock, but who had no " personal interest, would be such a holder. So one " whose name had been used as a transferee of stock " without his consent; and so, I think, of a holder by " hypothecation for a debt, who had received payment, " and given a power of attorney to re-transfer the stock " before the failure of the bank. The person making the " transfer is not the equitable owner in case of an hy- " pothecation. He has, it is true, an equitable interest, but " is not, in any proper sense, an owner. He can neither " receive the dividends, vote upon the stock, nor compel " a transfer to himself, while the debt remains unpaid. " He has precisely the same interest which the purchaser " of stock under an executory agreement, without a trans- " fer and before paying the purchase price, would have; " and yet no one would consider such a purchaser an " owner in any sense, or suppose he could be assessed as " a stockholder. On this part of the case I concur in " opinion with the special term.

" 2. Other parties appealed to the general term, " because, as they alleged, they had been charged in re- " spect to stock standing in their names, but which they " held as trustees for the bank itself. An effort appears " to have been made by the directors to sustain the credit " of the stock by becoming purchasers of it in the

" market. This was done in the name of one of their " number, or in that of some person friendly to them. " The note of the purchaser was taken by the bank, which " then advanced the money for the stock to the seller, " upon a discount of the purchaser's notes, and the trans- " fer was made to the individual purchaser. The plan " was, that it should be so held until a real purchaser " could be found, to whom it was then to be transferred. " During this state of things the bank failed. It was in " proof that the directors did not consider that they had " a right to purchase stock in behalf of the bank, being " advised that it was illegal. I am of opinion that the " referee was right in charging the persons in whose " name the stock stood as the contributors towards the " debts. There was not, in fact, any trust in favor of the " bank, if it had a right to traffic in its own stock. The " most that can be said is, that the purchasers relied " upon the directors, who controlled the bank, to carry " on the debt contracted by them until other *bona fide* " purchasers could be found. They all expected that " such a time would arrive; but while thus waiting the " directors were deprived of their power, and the parties " who assumed the risk of holding the stock must abide " by the consequences."

BRIEF OF THE ARGUMENT.

I.

The judgment cannot be upheld upon the grounds on which the Court below upheld it.

Those grounds were these, 1st: That although the way in which the bank got this stock was in violation of law, there was *a* way in which it *could* have *legally* got it.

That is, it could have taken it *as collateral security* for a loan of money. AND *since it represented itself to be a stockholder*, anybody dealing with the savings bank *would have the right to rely upon that representation as a representation that the stock was got in the legal way* and not in the illegal way, and therefore that the bank *was estopped* to deny that it was a stockholder.

Possibly if Mr. Nat Kennedy had *known* that the bank had represented itself to be a stockholder, and *in the reliance upon that representation had paid in the city's money*, the bank *might* now be estopped to deny the truth of that representation.

But the trouble is that, if such were the fact, Mr. Nat Kennedy *has wholly omitted to prove it.*

There is not any proof in the case to show that *he even knew that the bank's name was on the books*, and of course without the *knowledge* of the fact he could not possibly *have relied upon* the fact.

It is not even proved that the bank's name *was on* the books when he deposited the money. It is proved that "on March 2nd, 1891, the different accounts were all "consolidated and the total amount of money due the city was figured up, and "these certificates were issued in the amounts of ten thousand dollars each, and "at Mr. Kennedy's request I marked them 'special deposit.' *The money was "already in the bank.* I do not know why Mr. Kennedy asked me to put special "deposit on these certificates.

"By Judge Luce: At the time these deposits were issued to Mr. Kennedy did

" any money pass from Mr. Kennedy to you into the bank at the particular time " when these deposits were issued?

" Witness, continuing: No, sir; the money that these deposits represented was " on deposit with the national bank, with the exception of the funds the savings " bank might have on hand. It was put in as an ordinary regular depositor would " put in and was distributed with the rest of the funds of the bank. Nothing was " stated by Mr. Kennedy relative to having this money put into any package by " itself " (p. 18).

It thus appears that the money was in the savings bank *before* the eleventh of March. *How long* before does not appear. In other words, the *time of the deposit* is *not* shown. It does *not* appear but what it was *before* Collins took the unendorsed Collier and Norcross certificates, *and before* he had them cancelled and put the nine hundred and ninety shares in his own name as cashier.

But the statute already quoted says (Civil Code, Pt. 4, § 322):

" The liability of each stockholder is determined by the amount of stock or shares " owned by him *at the time the debt or liability was incurred*; and such liability " is not released by any subsequent transfer of stock."

It is plain that Mr. Nat Kennedy has not proved his case. Whether that presents a Federal question which can be taken advantage of in this court is another matter.

2. The other ground upon which the court below relied was that the national bank had received and still retains the benefit of the transaction:

In other words—a ratification.

The text of the part of the opinion referred to is as follows:

P. 24; 101 Cal., 495, 497:

" The defense of *ultra vires* is looked upon by courts " with disfavor whenever it is presented for the purpose " of avoiding an obligation which a corporation has as- " sumed merely in excess of the powers conferred upon it " and not in violation of some express prohibition of the " statute. Courts are inclined to treat the corporation as " estopped from setting up this defense in all cases when " it has received and retains the benefit of the transaction " and seeks by this plea to avoid its correlative obliga- " tion. In Evans *v.* Bailey, 66 Cal., 112; 4 Pac., 1089, " an action was brought against the stockholders of the " California Fruit & Meat Shipping Company to recover " from them their respective proportions of certain indebt- " edness to the plaintiff of that corporation. One of these

" defendants was the People's Ice Company, another cor-
" poration, which held a thousand shares of the capital
" stock of the corporation debtor, and to its objection that
" it was *ultra vires* for it to hold stock in another corpo-
" tion it was held that as it did not appear that it was not
" within the scope of its power to hold stock in the de-
" fendant corporation under any circumstances or for any
" purpose, and as the circumstances under which it ac-
" quired the stock were not shown, the defense could
" not be maintained. There is no provision in the
" statute by which a national bank is expressly pro-
" hibited from becoming a stockholder in another
" corporation, and while it may be conceded that its
" subscription to the shares of another corporation
" would be so far in excess of the powers conferred by
" the statute under which it is organised that its execu-
" tory contract therefor would not be enforced, it by no
" means follows that if such contract is executed and it
" has been registered as a stockholder it is not entitled to
" a voice in its corporate management or to its share of
" the corporate earnings while the corporation is in exist-
" ence or of its assets upon a dissolution thereof. It may
" take shares in another corporation as collateral security
" for a loan made by it, and if the loan is not paid it may
" become the owner of those shares and have them regis-
" tered in its name upon the books of that corporation,
" and in such a case it is subject to the same liabilities as
" any other stockholder. In Bank *v.* Case, 99 U. S., 628,
" the bank had become a stockholder in another corpora-
" tion under such circumstances, and it was held to be
" liable for its proportion of the debts of the corporation
" in which it had been a stockholder, although it had
" transferred the stock to one of its clerks for the purpose
" of avoiding such liability. As the appellant herein
" could have taken the stock of the savings bank in satis-

"faction of a loan for which it had been pledged to it as "security it was within the scope of its power to become "a stockholder therein, so that it cannot be said that it "was prohibited by statute from becoming such stock- "holder. Having caused itself to be registered upon the "books of the corporation as a stockholder, any person "dealing with the corporation would be justified in as- "suming that it had become such stockholder by virtue "of a transaction within its power, rather than in viola- "tion of the laws of its creation, and so long as it held "itself out as such, it ought not to be permitted to de- "fend against its liability as such stockholder by show- "ing that it had become such in violation of law. "'Strangers are presumed to know the law of the land, "'and they are bound, when dealing with corporations, "'to know the powers conferred by their charter. These "'are open to their inspection, and it is easy to deter- "'mine whether the act is within the scope of the general "'powers conferred for that purpose, but they have no "'access to the private papers of the corporation or to "'the motives which govern directors and stockholders, "'and no means of knowing the purposes for which an "'act that may be lawful for some purposes is done. The "'very fact that the appointed officers of the corporation "'assume to do an act in the apparent performance of "'their duty which they are authorised to perform for "'the lawful purposes of the corporation is a representa- "'tion to those dealing that the act performed is "'for a proper purpose, and such is the pre- "'sumption of the law, and upon this presumption "'strangers having no notice in fact of the unlawful pur- "'pose are entitled to rely.' Ditch Co. *v.* Zellerbach, 37 "Cal., 587. The appellant has not repudiated the agree- "ment under which it received the stock, but still retains "it, and, so far as is shown by the record, claims to be

" the owner of it and to share in all the earnings and " assets of the corporation. During the period that it has " claimed to be such owner it has received dividends out " of the assets of the savings bank, and to that extent " diminished the corporate property which otherwise " might have been appropriated in satisfaction of the " plaintiff's claim. See Mitchell *v.* Beekman, 64 Cal., " 117; 28 Pac., 110. Having had the benefits of the " transaction, and still enjoying its fruits, it is estopped " from denying a liability which is correlative to such " benefit and fruits and dependent thereon. See Morse, " Banks, Sec. 735."

I.

1. The Estoppel.

1. It is perfectly well settled that an estoppel because of a representation of fact can be taken advantage of solely by one *who has relied upon it to his injury.*

And this must be proved, or else the case will stand upon the truth.

This is as old as Littleton.

Co. Litt., 352 b.

And in Ketchum *v.* Duncan, 96 U. S., 659, the Court said, by Mr. Justice Strong:

(P. 666.) " An estoppel *in pais* does not operate in favor " of everybody. *It operates only in favor of a person* " *who has been misled to his injury, and he only can set* " *it up.* If, therefore, there be any estoppel in this case, " it must be in favor of some bondholder (if any there " was) who was led to believe, by the action of William " B. Duncan, that the railroad company was, in May and " November, 1874, paying the coupons of the first mort-

"gage, then falling due, and paying them in order to ex-
"tinguishment; but no such bondholder asserts such an
"estoppel. So far as it appears, no one of the appellants
"was so misled. No one of them can claim an estoppel
"*which is personal, and of which only the person misled*
"*to his hurt can avail himself.* Indeed, it does not appear
"that any one of the witnesses (very few in number) who
"supposed the coupons were being paid when they re-
"ceived their money from the Bank of Mobile, was at the
"time, or is now, the holder of a single first-mortgage
"bond. Nor is there a single coupon-holder who now
"claims that he was misled or deceived by any of Duncan,
"Sherman & Co.'s agents, by the Bank of Mobile, or the
"Union Bank of London, or by the Crédit Foncier. It is
"impossible, therefore, to see how there can be any
"estoppel, or wherein can be found any fraud in purchas-
"ing the coupons."

And the law of California is the same.

Biddle Boggs vs. *Merced Mining Co.*, 14 Cal., 279,

where the Court said, by Mr. Chief Justice FIELD:

(P. 367.) "It must appear, *first*, that the party making
"the admission by his declarations or conduct, was ap-
"prised of the true state of his own title; *second*, that
"he made the admission with the express intention to
"deceive, or with such careless and culpable negligence
"as to amount to constructive fraud; *third*, that the other
"party was not only destitute of all knowledge of the
"true state of the title, but of the means of acquiring
"such knowledge, and, *fourth*, that he relied directly
"upon such admission, and will be injured by allowing
"its truth to be disproved."

This language has been quoted or referred to with approval some twenty-five times by the Supreme Court of California.

One such case, and quite a recent one—March, 1891—is *Dean* vs. *Parker*, 88 Cal., 283, 288.

2. And there is another reason why there cannot be any estoppel.

The curious statute under which they claim makes liable

1. Every equitable owner, although the stock is on the books in another's name.
2. Every person who has advanced the purchase money or installments upon stock standing on the books in the name of a minor.
3. A guardian or trustee who voluntarily invests trust funds in the stock, but
4. Not any other guardian or trustee.
5. The person for whose benefit such an investment is made when he becomes competent and able to control the same, at which time the responsibility of the guardian or trustee ceases.
6. "*Stock held as collateral security* * * * *does* "*not make the holder thereof a stockholder within* "*the meaning of this section* * * * *so as to* "*charge him with any proportion of the debts or* "*liabilities of the corporation; but the pledgor* " * * * *is to be deemed the stockholder as re-* "*spects such liability.*"

Under such a statute the fact that stock stands in one's name on the books amounts to no sort of a representation. The person in whose name it stands may be a pledgee or any other one of the above things, and so not liable, *according to the express provision of the statute*, although the stock stands in his name.

3. There is a third reason which ought to be tolerably sufficient of itself.

The Court said in *Union Pacific Ry. Co.* v. *Chicago, &c., Ry. Co.*, 163 U. S., 564—this:—

By Mr. Chief Justice Fuller:

(P. 581.) "A contract made by a corporation beyond "the scope of its powers, express or implied, on a proper "construction of its charter, cannot be enforced, or ren- "dered enforceable *by the application of the doctrine of* "*estoppel.*"

Italics are mine of course.

Taking a gift or *gratuitously undertaking to pay the debt of another* cannot under any circumstance be construed to be within the *business of banking*. This contract, therefore, if it were a contract, was "beyond the "scope of" the "powers, expressed or implied, on a "proper construction of its charter" of the national bank.

II.

The Ratification.

If to have taken the stock in question was *beyond* the powers of *the cashier*, but *within* those of *the corporation* there might be something in this, *but if it were beyond the powers of the whole corporation*, then there is not anything in it. A corporation cannot do by ratification what it cannot do directly.

In the latter case the appropriate remedy is to make it return the dividend, if it ever got one.

But there is another reason why the principle of ratification will not apply.

The proofs are not as definite as they might be, but it is sufficiently apparent that it was Collins—the cashier of the national bank—who transferred the stock and received the dividend, if any was received. There is no proof whatever that any other officer or director of the national bank knew anything about the matter.

Under these circumstances, assuming that the act was beyond the power of Collins, his knowledge was not the knowledge of the bank within the principle applied in the case of *American Surety Company* v. *Pauly*, 72 Fed. Rep., 470. That case turned upon another of Collins' acts. By July of this same year—1891—Collins had become president of the bank, and the new cashier—O'Brien—applied to the American Surety Company for a policy insuring the bank against losses from acts of dishonesty on his—O'Brien's—part. Collins, as president, signed an application or certificate, in which he stated that O'Brien had been in the employ of the bank for three years and had always performed his duties in a faithful and satisfactory manner. In the trial of an action upon that policy, the American Surety Company offered evidence, which it claimed tended to show prior acts of dishonesty on O'Brien's part. BUT it also appeared that Collins was concerned in the same acts. The Circuit Court of Appeals for the Second Circuit held that, since Collins was responsible for the matters himself, his knowledge was not the knowledge of the bank, and the proposition is abundantly sustained by the authorities there cited (72 Fed. Rep., 481–2).

II.

The taking of the stock was beyond the powers of the national bank and void.

First Nat. Bank *v.* National Bank of Baltimore, 92 U. S., 122.

The transaction in this case was either a gift from Norcross and Collier to the national bank, or it was not anything at all.

The national bank did not pay a cent for the stock in any sort of way, and it is expressly admitted that it did not take it as security or anything of that kind.

> *If it had* this action would fail under the express provision of the California statute—"*Stock held as collateral security*, or by a trustee, or in any other repre-"sentative capacity, *does* NOT *make the holder thereof a stockholder, within the* "*meaning of this section*, except in the cases above mentioned, *so as to charge* "*him with any proportion of the debts or liabilities of the corporation; but the* "*pledgor, or person, or estate represented, is to be deemed the stockholder, as re-*"*spects such liability*" (ante, p. 7).

What happened was this:

One thousand shares of stock, upon which twenty per cent. only had been paid, had stood in the names of Norcross and Collier ever since the starting of the savings bank. Certificates for these two blocks of stock had been made out to Norcross and Collier, but had never been taken away by them and still remained in the savings bank. Collins induced the cashier of the savings bank to accept the surrender of these certificates and issue new ones for the same stock to himself, as cashier of the national bank. He did this, so far as appears, without any authority from either Norcross or Collier, and certainly without their endorsement of the certificates.

If he did not have any authority from Norcross and Collier, the transaction was nothing at all. If he did have authority—the transaction was *a* GIFT—a gift of stock in a bank insolvent and in failing circumstances—upon which there was unpaid and liable to call *four-fifths* of the subscription price—seventy-nine thousand two hundred dollars, and the acceptance of *which gift* made the gift—taker liable for *two-fifths of all the debts of the failing bank.*

1. THE ACCEPTANCE OF SUCH A GIFT IS NOT THE DOING OF THE BUSINESS OF BANKING.

In *First National Bank* v. *Nat. Exchange Bank*, 92 U. S., 122, the Court said, by Mr. Chief Justice Waite:

(P. 126.) "A national bank can 'exercise by its board "'of directors, or duly authorized officers or agents, sub-"'ject to law, all such incidental powers as shall be neces-"'sary to carry on the business of banking, by discount-"'ing and negotiating promissory notes, drafts, bills of "'exchange, and other evidences of debt; by receiving "'deposits; by buying and selling exchange, coin, and "'bullion; by loaning money on personal security, and "'by obtaining, issuing and circulating notes.' Rev. "Stat., Sect. 5136, par. 7; 15 Stat. 101, Sect. 8.

"Authority is thus given to transact such a banking "business as is specified, and all incidental powers neces-"sary to carry it on are granted. These powers are such "as are required to meet all the legitimate demands of "the authorised business, and to enable a bank to con-"duct its affairs, within the general scope of its charter, "safely and prudently. This necessarily implies the "right of a bank to incur liabilities in the regular course "of its business, as well as to become the creditor of "others. Its own obligations must be met, and debts "due to it collected or secured. The power to adopt "reasonable and appropriate measures for these purposes "is an incident to the power to incur the liability or be-"come the creditor. Obligations may be assumed that "result unfortunately. Loans or discounts may be made "that cannot be met at maturity. Compromises to avoid "or reduce losses are oftentimes the necessary results of "this condition of things. These compromises come "within the general scope of the powers committed to "the board of directors and the officers and agents of the "bank, and are submitted to their judgment and dis-"cretion, except to the extent that they are restrained by "the charter or by-laws. Banks may do, in this behalf, "whatever natural persons could do under like circum-"stances.

" To some extent, it has been thought expedient in the " National Banking Act to limit this power. Thus, as to " real estate, it is provided (Rev. Stat., Sect. 5137; 13 " Stat. 107, Sect. 28) that it may be accepted in good faith " as security for, or in payment of, debts previously con- " tracted; but, if accepted in payment, it must not be re- " tained more than five years. So, while a bank is " expressly prohibited (Sect. 5201; 13 Stat. 110, Sect. 35) " from loaning money upon or purchasing its own stock, " special authority is given for the acceptance of its " shares as security for, and in payment of, debts pre- " viously contracted in good faith; but all shares pur- " chased under this power must be again sold or disposed " of at private or public sale within six months from the " time they are acquired.

" Dealing in stocks is not expressly prohibited; but such " a prohibition is implied from the failure to grant the " power. In the honest exercise of the power to compro- " mise a doubtful debt owing to a bank, it can hardly be " doubted that stocks may be accepted in payment and " satisfaction, with a view to their subsequent sale or con- " version into money so as to make good or reduce an an- " ticipated loss. Such a transaction would not amount to " a dealing in stocks. It was, in effect, so decided in " *Fleckner* vs. *Bank U. S.*, 8 Wheat., 351, where it was " held that a prohibition against trading and dealing was " nothing more than a prohibition against engaging in the " ordinary business of buying and selling for profit, and " did not include purchases resulting from ordinary bank- " ing transactions. For this reason, among others, the " acceptance of an indorsed note in payment of a debt " due was decided not to be a 'dealing' in notes. Of " course, all such transactions must be compromises in " good faith, and not mere cloaks or devices to cover un- " authorised practices.

" It is difficult to see how a debt due from, or a contested " obligation resting upon, a bank, occupies any different " position in respect to this power of adjustment from that " of a debt owing to it. The object in both cases is to " get rid of or reduce an apprehended loss growing out of " legitimate business; and it would seem that whatever " might be done in the one case ought not to be excluded " from the other under the same circumstances. Often a " discharge by a bank of its own obligation creates a debt " due to it from another. Such was the case here. Bayne, " without authority, transferred to the defendant as col- " lateral security for his indebtedness, a certificate of " deposit issued to him by the plaintiff, and afterwards " collected the money due upon the certificate from the " plaintiff without disclosing the transfer. Any payment " by the plaintiff to the defendant, therefore, in discharge " of its liability, upon the certificate, became a lawful " charge against Bayne. He was insolvent. It was, on " this account, not only the right, but the duty of the " officers and agents of the plaintiff to protect by their ar- " rangements, as far as possible, the stockholders whose " interests they represented. This was necessarily left to " their judgment and discretion. No question of good " faith is involved. The transaction for all the purposes " of this suit must be taken to have been, in fact, what " it purports to be—a fair and honest compromise of " an outstanding claim, with a view to ultimate protec- " tion against an impending loss. As such we think it " was within the corporate powers of the bank, and that " the Court of Appeals did not err in so holding."

"Dealing in stocks is not expressly prohibited; *but "such a prohibition is implied from the failure to grant "the power.*"

That is what the Court said.

2. THE POWERS OF NATIONAL BANKS ARE CONFINED TO THE BUSINESS OF BANKING.

First Nat. Bank. *v.* Nat. Bank of Baltimore, 92 U. S., 122, just quoted.

And in *Logan County Bank* v. *Townsend*, 139 U. S., 67, the Court, by Mr. Justice Harlan, said:

(P. 73.) "It is undoubtedly true, as contended by the "defendant, that the national banking act is an enabling "act for all associations organised under it, and that a "national bank cannot rightfully exercise any powers "except those expressly granted by that act, or such in- "cidental powers as are necessary to carry on the busi- "ness of banking for which it was established."

3. AN ACT NOT WITHIN THE POWERS GRANTED IS VOID.

In *Thomas* v. *Railroad Co.*, 101 U. S., 71, the Court, by Mr. Justice Miller, said:

(P. 82.) "We take the general doctrine to be in this "country, though there may be exceptional cases and "some authorities to the contrary, that the powers of "corporations organized under legislative statutes are "such and such only as those statutes confer. Conceding "the rule applicable to all statutes, that what is fairly "implied is as much granted as what is expressed, it re- "mains that the charter of a corporation is the measure "of its powers, and that the enumeration of these "powers implies the exclusion of all others."

To the same effect are *Penn. Co.* v. *St. Louis, Alton,*

&c., Railroad Co., 118 U. S., 290, 309; *Oregon Railway Co.* v. *Oregonian Rw. Co.*, 130 U. S., 1, *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S., 24, and *Union Pacific R'y Co.* v. *Chicago, &c., R'y Co.*, 163 U. S., 564.

In the *Oregon Railway* case the Court, by Mr. Justice Gray, said:

(P. 48.) "The charter of a corporation, read in the light "of any general laws which are applicable, is the meas- "ure of its powers, and an enumeration of those powers "implies the exclusion of all others not fairly incidental. "All contracts made by a corporation beyond the scope "of those powers *are unlawful and void*, and "no action can be maintained upon them in the "courts, and this upon three distinct grounds: the ob- "ligation of every one contracting with a corporation, to "take notice of the legal limits of its powers; the in- "terest of the stockholders, not to be subjected to risks "which they have never undertaken; and above all, the "interest of the public, that the corporation shall not "transcend the powers conferred upon it by law."

All of these cases cite with approval *Ashbury Railway Carriage & Iron Co.* v. *Riche*, LR7HL. 653. Both Mr. Justice Miller in delivering the opinion of the Court in *Thomas* v. *Railroad Company*, and Mr. Justice Gray in delivering the opinion of the Court in *Central Transp. Co.* v. *Pullman's Car Co.*, say (101 U. S. 83; 139 U. S. 56), of that case, "the broad doctrine was established "that a contract not within the scope of the powers con- "ferred on the corporation cannot be made valid by the "assent of every one of the shareholders, *nor can it by* "*any partial performance become the foundation of a* "*right of action.*"

Italics are mine, of course.

In that case it was squarely held that such a contract was wholly and absolutely *void*.

> Lord *Cairns*, delivering his judgment, said (LR7HL. 673): "If so, according to "the words of Mr. Justice *Blackburn*, every Court, whether of law or of equity, is "bound to treat that contract, entered into contrary to the enactment, I will not "say as illegal, but as *extra vires*, and wholly null and void, and to hold also that "a contract wholly void cannot be ratified."
>
> And Lord *Chelmsford*, speaking of a contract, said (LR7HL. 679): "This is "clearly not within any of the objects described in the memorandum of associa- "tion, and the contract was *ultra vires*, and therefore not voidable merely, but "absolutely void."

The full authority of *Ashbury Railway Co.* v. *Riche* has ever since been most firmly maintained.

Attorney General v. *Great Eastern Railway Company*, 5 App. Cas. 473;

Baroness Wenlock v. *The River Dee Company*, 10 App. Cas. 354;

Trevor vs. *Whitworth*, 12 App. Cas. 409;

Ooregum Gold Mining Co of India v. *Roper* (1892) A. C. 125;

Mann v. *Edinburgh Northern Tramways* (1893) A. C. 70.

All of these cases hold distinctly and firmly—*first*, that a power not expressly granted is prohibited, and *secondly*, that *any* exercise of any such power is absolutely void.

> In *Attorney General* v. *Great Eastern Railway Co.*, 5 App. Cas. 473, the head note states:
>
> "The doctrine of *ultra vires* as explained in *The Ashbury Railway Company* v. "*Riche*, is to be maintained, but is to be applied reasonably, so that whatever is "fairly incidental to those things which the Legislature has authorised by an Act "of Parliament, ought not (unless expressly prohibited) to be held as *ultra vires*.
>
> "In an Act of this kind granting special powers, what is not permitted is pro- "hibited."

And the later cases have steadily maintained the same doctrines.

It will be observed that but two of the later cases are railroad cases.

Some of the cases make a distinction between rail road companies and other corporations upon the ground that a railroad has certain public obligations.

So have all corporations. But more than all others—more than railroads—*national banks* have *public* obligations. Their very existence depends upon this. The constitutionality of the chartering of banks rests solely upon the grant to the Congress of the powers;—to borrow money—to levy taxes—to regulate commerce—to maintain an army and a navy—to make war. And banks are permitted to be chartered by the Congress solely because they are instrumentalities by means of which these great powers are carried out.

McCullough *v.* Maryland, 4 Wheat., 316, 407.

Their life therefore depends only upon their public obligations; their private ones being merely incidental and dependent.

There are certain cases which have been adjudged by the Court, which it has been claimed, bear out a contrary doctrine. These are—

Smith *v.* Shelley, 12 Wall., 358:

> Land was deeded to a bank, before it was authorised to do business, and the question was raised by collateral attack.

Gold Mining Company *v.* Nat. Bk., 96 U. S., 640:

> A depositor overdrew his account, and then in a suit, by the bank, to recover that, alleged in defense that that, with his other indebtedness, amounted to more than one-tenth of the capital of the bank.

National Bank *v.* Matthews, 98 U. S., 621,
National Bank *v.* Whitney, 103 U. S., 99, and

Swope *v.* Leffingwell, 105 U. S., 3:

The national bank made a loan and took a mortgage on real estate as security. In a suit to foreclose the mortgage the borrower set up a claim that the whole thing was *ultra vires* of the bank.

Nat. Bank of Xenia *v.* Stewart, 107 U. S., 676:

Shares of the bank were given as collateral, and the note not having been paid the bank sold them. The borrower, *without paying anything on his note, which was for more than the shares sold for*, sued to get them back. Naturally he did not get them.

Reynolds *v.* Crawfordsville Bank, 112 U. S., 405:

The bank purchased real estate, and the Court held that the *debtor* could not raise the question of its right to do so (p. 412).

Frits *v.* Palmer, 132 U. S., 282:

There was a deed to a foreign corporation, which deeded the land again.

Logan County Nat. Bank *v.* Townsend, 139 U. S., 67:

Townsend sold bonds to the bank under an agreement that he might buy them back at the same or a less price. This *the bank* claimed was *ultra vires*, and it tried to keep the bonds.

Thompson *v.* The Saint Nicholas Bank, 146 U. S., 240:

Bonds were delivered as security for all such moneys as should be advanced on such cheques as should be certified. Cheques were certified and paid and the bonds sold for repayment. It was claimed that it was *ultra vires* to certify the cheques.

As to *Smith* v. *Sheeley* and *Frits* v. *Palmer*, the Court likened the matter to a deed to an alien, and a deed again by him.

These cases therefore need be not any further considered.

They are only mentioned because cited in *Citizens' State Bank* v. *Hawkins*, 71 Fed. Rep., 869—of which presently.

In *Thompson* v. *Saint Nicholas Bank*, 146 U. S., 240, the Court held explicitly that the acts questioned were within the powers granted, by the express provision of the act of Congress.

In *Logan County Nat. Bank* v. *Townsend*, 139 U. S., 67, the Court held that it made no manner of difference whether the contract were *ultra vires* or no. If it were, then of course it was the duty of the bank to return the bonds. If it were not, then the plaintiff had a right to have the contract enforced—that is, to the return of the bonds.

As to all the other cases *Gold Mining Co.* v. *Nat. Bk.*, 96 U. S., 640; *National Bank* v. *Matthews*, 98 U. S., 621; *National Bank* v. *Whitney*, 103 U. S., 99; *Swope* v. *Leffingwell*, 105 U. S., 3; and *Nat. Bank of Xenia* v. *Stewart*, 107 U. S., 676, the *vital* facts were these.

The borrowers, having borrowed the money and got it, tried to keep the money and also get back their collateral. Naturally they did not succeed.

The *radical* distinction, however, between these cases and the principal case is this:

In *this* case the act in question is *wholly* OUTSIDE *of the general powers conferred*; the taking of a gift and the gratuitous assumption of the debt of another being quite clearly neither a part of the business of banking, nor incidental to that business.

But, in those cases—*all of them*—the acts were INSIDE *of the general powers conferred*, and *only opposed to the special limitations upon those powers.*

The Court has held this:

In *McBrown* v. *Scottish Investment Company*, 153 U. S. 318, it said, by Mr. Justice Harlan (p. 326): "In "line with the above cases are those in which national "banks have been held entitled to recover upon securities "*taken in the course of business*, but in violation of the "Act of Congress. In *National Bank* v. *Matthews*, 98 "U. S. 621, 627, the Court said: 'The statute does not "'declare such a security void. It is silent upon the sub-"'ject. If Congress so meant, it would have been easy "'to say so; and it is hardly to be believed that this "'would not have been done instead of leaving the "'question to be settled by the uncertain result of litiga-"'tion and judicial decision. Where usurious interest "'is contracted for, a forfeiture is prescribed and ex-"'plicitly defined.' *National Bank* v. *Whitney*, 103 "U. S. 99, 103; *Smith* v. *Sheeley*, 12 Wall., 358, 361."

Italics are mine.

Here is the distinction, and it is clear.

If the act is *within* the general powers conferred it is not necessarily void.

BUT if it is *without* the general powers conferred it is *wholly* VOID.

There is not any case where the Court has ever held otherwise.

In *Citizens' State Bank* vs. *Hawkins*, 71 Fed. Rep., 369; 18 "C. C. A.," 78, the Circuit Court of Appeals for the Seventh Circuit said:

"An act is ultra vires a corporation when it is beyond "and outside of the powers conferred by its founders,—

"when the corporation is without authority to perform it "under any circumstances or for any purpose. Such "acts are wholly void, and no contract for their perform- "ance can be enforced by or against the corporation, the "plea of ultra vires being available to either party to the "contract. Such was the character of the agreement "under consideration in Thomas *v.* Railroad Co., 101 "U. S., 71; Central Transp. Co. *v.* Pullman's Palace "Car Co., 139 U. S., 24, 11 Sup. Ct., 478. There are, "however, acts done in excess of conferred powers, "illegal as to shareholders, but for which the corporation "is liable to innocent parties; as, for example, where a "corporation is authorized to perform an act for a specific "purpose, and performs the act for another and unauthor- "ized purpose. In such case the plea of ultra vires is "available to neither party. Such was the character of "the contracts under consideration in Union Gold Mining "Co. *v.* National Bank, 96 U. S. 640; Smith *v.* Sheeley, 12 "Wall. 358; Bank *v.* Matthews, 98 U. S. 621; Bank *v.* "Whitney, 103 U. S. 99; Bank *v.* Stewart, 107 U. S. "676, 2 Sup. Ct. 778; Fritts *v.* Palmer, 132 U. S. 282, 10 "Sup. Ct. 93; Bank *v.* Townsend, 139 U. S. 67, 11 Sup. "Ct. 496; Thompson *v.* Bank, 146 U. S. 240, 13 Sup. Ct. "66; Bank *v.* Butler, 157 Mass. 548, 32 N. E. 909; "Ditch Co. *v.* Zellerbach, 37 Cal. 543. In the case "in hand no power is granted to purchase stock in "another bank, and, therefore, a prohibition to do "so may be implied. First Nat. Bk. *v.* National "Exch. Bank, 92 U. S. 122. *It is not doubted, how- "ever, that under the banking law of Indiana the "plaintiff in error had power to accept stock in another "bank as security for a loan, or to acquire such stock "by levy thereon and sale thereof under execution to "satisfy a debt due to it.* Morse, Banks, § 59; Bank *v.* "Case, 99 U. S. 628. *It had the power, therefore,* UNDER

" CERTAIN CIRCUMSTANCES, AND FOR CERTAIN PURPOSES, *to* " *acquire stock in a national bank.* It obtained the stock " in question by purchase from a third party, and pro- " cured its transfer to itself upon the books of the national " bank. *The acquisition of such stock was within the* " *general scope of its powers. The case is, therefore, one* " *of* AN ABUSE OF A GENERAL POWER, *a wrongful exercise* " *of conferred power, for purposes and under circum-* " *stances contrary to law,* AND NOT THE CASE OF THE EX- " ERCISE OF A POWER NOT IN ANY EVENT GIVEN. *It is,* " THEREFORE, *related to the second class above noted,* to " which the doctrine of ultra vires does not apply. In all " such cases a corporation cannot 'set up its own viola- " 'tion of law to escape the responsibility resulting from " 'its illegal action.' (*Id.*, 628–633). The misuse of power " in such cases is matter for consideration by the author- " ities of the state. If such abuse of power be prejudicial " to the public a forfeiture of the charter will furnish a " preventive remedy. It would be a grievous wrong to " permit a corporation to assert its own abuse of power to " escape liability under the facts here disclosed. It held " this stock for many years, taking any profits accruing " therefrom. It must meet the liability resulting from " the failure of the bank. It cannot approbate and repro- " bate. It has received the benefits. It must bear the " burdens. 'The doctrine of ultra vires, when invoked " 'for or against a corporation, should not be allowed to " 'prevail when it would defeat the ends of justice or " 'work a legal wrong.' Railroad Co. *v.* McCarthy, 96 " U. S., 258–267."

Italics and capitals are mine.

The Citizens' State Bank was an Indiana Bank.

By section 4 of Chapter VIII. of the Laws of Indiana of 1873 (p. 21), the part of which, now to be quoted, remained in force until, in the same words, it went into the Rev. Stat. of 1894 as Sec. 2994, it was thus enacted in regard to the banks of Indiana:—"*Such association* shall have power to adopt a corporate seal, and shall " have succession by the name designated in its articles of association and by

" such name it may make contracts, sue and be sued, complain and defend in any " court of law and equity, as fully as natural persons, and *may exercise, under this* " *act, all the powers incidental and proper, or which may be necessary and usual* " *in carrying on the business of banking as a bank of discount and deposit; may* " *receive deposits, buy and sell exchange, gold and silver coin and bullion, and* " *may loan money, negotiate, sell and guarantee such loans, and promissory* " *notes, bonds, drafts, bills of exchange and other evidences of debt, and any* " *securities thereof:* and may become and act as the trustee for the same as fully " as private persons may; but no such association shall issue notes, bills, or other " evidences of indebtedness in the form or similitude of Bank Notes, and intended " to circulate as bank notes, or bills, or as money. And such association may con- " tract for, charge, take, reserve, and receive on loans and discounts, the highest " rates of interest allowed by the law of this State to be contracted for, taken and " received by individuals."

The facts were these: The Citizens' Bank bought, on the 31st day of July, 1885, the stock in question of one William Wallace, Receiver, and directly had the stock transferred into its name on the books of the national bank. So matters stood for more than eight years, when the national bank—in 1893—failed (71 Fed. Rep., 369, 370. 18 "C. C. A." 78, 79).

We have not any particular occasion to quarrel with the way in which the rules of law are stated by the court in this last case, but we have *very* particular occasion to quarrel with the way in which they are applied.

But—before proceeding to the application—to recapitulate the rules:

The businesses of a national bank are two, banking and issuing bank notes as currency. These powers, however, are not left to be exercised to their fullest extent. "To "some extent," said the Court by Mr. Chief-Justice Waite (92 U. S., 127), "it has been thought expedient in "the National Bank Act to limit this power," and the opinion then goes on to describe the particular limitations. *They are acts done* in violation of these limitations, but still done *in the regular course of the business of banking, and thus within the general power granted*, which the Court has held that a debtor, when trying to get out of paying his debt, cannot question.

An act done *wholly outside of those general powers* can never raise a question between the bank and its borrower, because lending is banking, and therefore an act *wholly outside* the general powers cannot be an act of lending, and hence cannot create the relation of lender

and borrower. At any rate there is not any such relation here.

That an act *wholly outside the scope of the general powers* is void has been uniformly held by the Court as explained above.

And the same is the law of California:—

Zottman *v.* San Francisco, 20 Cal., 96;
Miners' Ditch Co. *v.* Zellerbach, 37 Cal., 543, 578;

of Kentucky:

Frankfort Bridge Co. *v.* City of Frankfort, 18 B. Monr., 41, 46;

of Massachusetts:

Davis *v.* Old Colony R.R. Co., 131 Mass., 258;

of Illinois:

Chicago Gas Light Co. *v.* People's Gas Light Co., 121 Ill., 530, 546;

of Kansas:

Abeles *v.* Cochran, 22 Kas., 405, 411;

of Michigan:

Hillsdale College *v.* Rideout, 82 Mich., 94, 102;
Orr *v.* Lacey, 2 D., 230;

of Pennsylvania:

Wood *v.* R.R. Co., 8 Phila., 94.

of Louisiana:

Railroad Co. *v.* Delamore, 34 A., 1225, 1228;

of New York:

Troy and Bost. R.R. Co. *v.* Boston, H. T. & W. Rw. Co., 86 N. Y., 107; 34 Hun, 630, 108 N. Y., 627.

The later reports (34 Hun & 108 N. Y.) being of an action of ejectment brought on the same title as that in 86 N. Y.

and, doubtless, of all the other States.

It remains to consider the application of these rules as made in *Citizens' State Bank* v. *Hawkins* above quoted.

In that case the Circuit Court of Appeals held the bank liable as a stockholder by this curious reasoning:

Of course the facts of that case are widely different from the facts of this; so our quarrel is not necessarily with the result, but with the reasoning of the court

An act wholly outside of the general powers granted is wholly void.

An act done "in excess of *conferred* powers"—as where the "corporation is authorized *to perform an* ACT "for a specific purpose, and performs *the act* for another "and unauthorized purpose" is not wholly void.

THEREFORE, *because* in the exercise of the business of banking it can become the owner of stock, it follows that when by some ACT wholly *outside* of the business of banking it becomes the owner of *stock*, the *act is* THEREBY *made to be* WITHIN *the business of banking.*

Because stock is stock.

That there may not be any doubt about this matter, I again quote the language:

(71 Fed. Rep., 371.) "It (the bank) had the power, "therefore, *under certain circumstances, and for certain* "*purposes, to acquire stock in a national bank.* It "obtained the stock in question by purchase from a third "party, and procured its transfer to itself on the books of "the national bank. *The acquisition of such stock was* "WITHIN THE GENERAL SCOPE OF ITS POWERS. The case "is, therefore, one of *an abuse of a general power, a* "*wrongful exercise of* CONFERRED power, for purposes "and under circumstances contrary to law, and not the "case of the exercise of a power not in any event given."

The part which I have put in capitals is what I deny. It is based solely upon the fact that the transactions are about *stock.*

I submit that the fallacy of this is clear. It is simply a confusion of the *power* with the *thing* upon which the power is exercised.

Let us test it by two or three illustrations.

Let us suppose the slavery laws of Brazil, under which it was said that the master had absolute power of life and death over the slave, to be still in force. Suppose a national bank made a loan of money and took slaves in Brazil as security. This it could probably lawfully do. That loan being unpaid, it bought in the slaves and became their owner. It then proceeded to kill one of them. All of this it might lawfully do. THEREFORE *the killing of any human being or of human beings generally is* "WITHIN THE GENERAL SCOPE OF ITS POWERS."

Again: Suppose the bank sends out its cashier on the road as the "Captain," with a mask, and two steel-barreled pistols, and riding a strawberry mare which has just had two double quarts of ale, and he stops my lady upon the king's highway—and takes her *money* in the good, old-fashioned way—or suppose, in more modern fashion, he "holds up" a railroad train and takes the *money* from the express safe. Now it is within the powers of the bank to acquire *money* in the business of banking. And, THEREFORE, *to get money by robbery is* "WITHIN THE GENERAL SCOPE OF ITS POWERS."

Again: In the business of banking the bank necessarily has dealings with human beings. THEREFORE *any dealings with any human being are* "WITHIN THE GENERAL "SCOPE OF ITS POWERS," with the result that "the "general scope of its powers" is extended to embrace pretty much everything in the universe of the Creator.

It will be further observed that the Court in the *Citizens' State Bank* case said this:

"There are, however, acts done in excess of conferred "powers, illegal as to shareholders, *but for which the* "*corporation is liable to* INNOCENT *parties.*"

The only "INNOCENT" parties in this case are the creditors of the California National Bank.

It is respectfully submitted that it is the *power* exercised and not the *thing* upon which it is exercised which makes the test.

The judgment should be reversed.

EDWARD WINSLOW PAIGE,
Of Counsel.

167-150

Office Supreme Court, U. S.
FILED,
MAR 5 1897
J. H. McKENNEY,
CLERK.

167-362

(15.757.)

SUPREME COURT OF THE UNITED STATES.

No. 206 of October Term, 1896.

THE CALIFORNIA NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

NAT. KENNEDY.

Brief for Defendant in Error.

GEORGE FULLER,
Attorney for Nat. Kennedy, Defendant in Error, San Diego, California.

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T. L. LEWIS,
Of Counsel

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

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SUPREME COURT OF THE UNITED STATES.

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THE CALIFORNIA NATIONAL BANK, PLAINTIFF IN ERROR,

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Brief for Defendant in Error.

STATEMENT OF THE CASE.

The statement of the case made in the brief for the plaintiff in error seems to be sufficient, and we will only add:

That this cause was commenced in November, 1891, in the Superior Court of the County of San Diego, State of California, by the filing of a complaint therein in an action entitled: "Nat Kennedy, plaintiff, vs. The California Savings Bank, S. G. Havermale, J. W. Collins, D. D. Dare and the California National Bank, defendants."

All of said defendants, except the California Savings Bank, were sued as stockholders of the said Savings Bank.

The California Savings Bank suspended on the 12th of November, 1891. (Record p 17).

POINTS AND AUTHORITIES.

We apprehend that the Federal question presented in this case, and the only question which this Court is called upon to consider, is as to whether the California National Bank is, under the circumstances disclosed by the Record, liable as a stockholder of the California Savings Bank for its proportion of the debts of the said Savings Bank.

It seems to be conceded by counsel for the plaintiff in error that under the laws of California the stockholders of corpora-

tions, including savings banks, are individually liable for the debts of such corporations.

Section 322 of the Civil Code of California, which provides for the liability of stockholders for the debts of corporations in which they hold stock is set out in brief of plaintiff in error (pp. 6 to 8).

In addition to this Statute, however, the Constitution of 1879 of this State, now in force, contains the following provisions:

Section 3 of Article 12 of the Constitution reads, in part, as follows:

"Sec. 3. Each stockholder of a corporation, or joint stock "association, shall be individually and personally liable for "such proportion of all its debts and liabilities contracted or "incurred during the time he was a stockholder as the "amount of stock or shares owned by him bears to the whole "of the subscribed capital stock or shares of the corporation "or association", etc.

Section 4 of the same Article is as follows:

"Sec. 4. The term 'corporation' as used in this Article "shall be construed to include all associations and joint "stock companies having any of the powers or privileges of "corporations not possessed by individuals or partnership; "and all corporations shall have the right to sue, and shall be "subject to be sued in all courts in like cases as natural "persons."

There can be no doubt that under the provisions of said Section 322 of the Civil Code and the above sections of the Constitution that each of the stockholders of a savings bank in this State are individually liable for such proportion of its debts and liabilities as the amount of stock or shares owned by each bears to the whole of the subscribed stock or shares of the corporation.

Kennedy vs. *Savings Bank*, 101 Cal. 495, 40 Am. St. Rep. 369.
Mitchell vs. *Beckman*, 64 Cal. 117.
Kennedy vs. *California Savings Bank*, 97 Cal., 93, 97, 33 Am. St. Rep. 163.
McGowan vs. *McDonald*, 111 Cal. 57.

It is held in the case last cited that neither the constitution of 1849 nor the constitution of 1879 of this state authorizes any exemption from personal or individual liability of the stockholders of savings banks and that it is beyond the power

of the legislature to exempt them from such liability; and the court, at page 67, uses the following language:

"It is also objected that the Pacific Bank was originally "organized for the purpose of doing business as a savings "bank and that the stockholders of such bank cannot be "held liable for its debts. But the provisions of the Consti- "tution of 1849 apply to the stockholders of all corporations "without regard to the character of the business to be trans- "acted, and the same is true of the Constitution of 1879. It "is not, therefore, within the power of the legislature or the "courts to declare any such exemption as that here claimed."

THE QUESTION THEN ARISES: WAS THE CALIFORNIA NATIONAL BANK A STOCKHOLDER OF THE SAVINGS BANK?

The Court below found such to be the fact (Record, p. 14–15), and this finding was evidently based upon the evidence of Mr. Hill, Cashier of the Savings Bank. Mr. Hill testified as follows:

"From March 2nd, 1891, to November 12th, 1891, the "time the California Savings Bank suspended, I held the posi- "tion of Cashier. These documents which you now show me "are signed by me, and were so signed while I was such "Cashier, and were delivered to Nat Kennedy, the City "Treasurer."

The Record then shows the following:

"The plaintiff then offered in evidence, as Exhibits, num- "bers 1, 2, 3, 4 and 5, the Certificates of Deposit, copies of "which were filed with and made a part of the Amended "Complaint in this action, and numbered 163, 164, 2036, "2035 and 2117" (p. 17).

Witness then continued his testimony as follows:

"The original issue consisted of five hundred shares each "to J. W. Collins, S. G. Havermale, D. D. Dare, Wm. "Collier and H. F. Norcross, issued January 13th, 1890,— "the date of the opening of the bank. The owners of stock "covering the time these several certificates of deposits were "issued, from March 2nd, 1891, to November 4th, 1891. "(Defendant The California National Bank objected to the "witness giving testimony as to who were the owners of stock "at that time, on the ground that the books were the best "evidence.")

Witness continuing:

"The books show that there were 990 shares issued to the

"Calfornia National Bank, and that certificate was dated "Jan. 2nd, 1891, but was the consolidation of three previous "certificates dated Sept. 10th, 1890. After the issuance of "these certificates they were held, and are held by the Cali- "fornia National Bank. The certificates were delivered to "the Cashier or President of the California National Bank, "either one or the other. I know that they were held by the "California National Bank, because I have seen them in the "possession of the Bank. My impression is that I have seen "them since its closing, but will not state that. (p. 18).

The same witness testified further as follows:

"I have now in my possession the first ledger that shows "the first dividend that was paid by the California Savings "Bank. There were two dividends paid. The first was "Dec. 11th; it was 5 per cent on the $25,000 capital stock "for six months. The *California National Bank* received "$750, being dividend on 1500 shares. I paid these divi- "dends myself. The next dividend was declared in Jan. "1891, and my recollection is that the dividend was paid and "the stockholders stood just as they did in the first divi- "dend." (p. 19).

The same witness further testified as follows:

"The original issue was five certificates of $500 (shares) "each, issued to J. W. Collins, S. G. Havermale, D. D. Dare, "William Collier and H. F. Norcross. That was the capital "stock. On September 10th, 1890, the 500 shares which "stood in Wm. Collier's name were handed in for cancella- "tion and new certificates issued. The original issue was "January 13th, 1890. The certificates that stood in the "name of H. F. Norcross were taken up and certificates Nos. "8, 9 and 10 were issued in the name of J. W. Collins, Cash- "ier of the California National Bank, on September 10th. "Mr. Norcross and Mr. Collier retained five shares each and "that would leave 990 shares in the name of J. W. Collins, "Cashier. On January 2, 1891, these certificates 6, 8 and 10 "were cancelled by the isssuance of certificate No. 12 in one "certificate of 990 shares to the California National Bank. "Mr. Collins delivered up the certificate which he held as "cashier and ordered me to issue them to the California Na- "tional Bank, and I took them in and attached them to the "old stubs and issued new certificates as he told me to do. "I put the words 'California National Bank' on that certifi- "cate." (p. 20).

It further appears that all of the above stockholders of the

California Savings Bank, except Mr. Norcross, were officers of the California National Bank—witness states

"Mr. Dare was vice-president; Mr. Collier, president; Mr. "Collins, cashier and Mr. Havermale, director. They were all "members of the directory of the bank, except Mr. Nor- "cross, during all the changes and issues that I have testified "to." (p. 20).

From the above evidence of Mr. Hill we submit that the court below was justified in finding, as a fact, that at the time of making each and all of said deposits and at all times mentioned in plaintiff's complaint the defendant, the California National Bank, was one of the stockholders of the Savings Bank and was the owner of 990 of said shares of stock. (pp. 14-15).

The question still remains, however, as to whether the National Bank, as a matter of law, was, under the circumstances of this case, liable as a stockholder for its proportion of the debts of the savings bank.

It is clear from the evidence of Mr. Hill and the findings of the court below that the National Bank was, nominally at least a stockholder of the savings bank, and that the books of the savings bank showed such fact and that the National Bank received at least two dividends of $750 each upon the shares of stock of the savings bank held by it.

The decision of the case by the Supreme Court of this state is reported in the 101 Cal.

Kennedy vs. Savings Bank, 101 Cal. 495.

The opinion of the court is also set out in full at pages 24-26 of the record.

It will be seen by reference to the opinion that the Supreme Court of this state based its decision largely upon the fact that the National Bank having taken and held the stock of the savings bank and accepted and retained the dividends declared and paid thereon and by so doing had the benefit of the transaction and was still enjoying its fruits, was estopped from denying a liability which is correlative to such benefit and fruits and dependent thereon, and the court at page 497 says:

"The defense of *ultra vires* is looked upon by the Courts "with disfavor whenever it is presented for the purpose of "avoiding an obligation which a corporation has assumed "merely in excess of the powers conferred upon it and not in "violation of some expressed prohibition of the Statute. "Courts are inclined to treat the corporation as estopped

"from setting up this defense in all cases where it has "received and retained the benefit of the transaction, and "seeks by this plea to avoid its correlative obligation."

"In *Evans vs. Bailey*, 66 Cal., 112, an action was "brought against the stockholders of the California Fruit and "Meat Shipping Company to recover from them their respec- "tive proportions of certain indebtedness to the plaintiff of that "corporation. One of these defendants was the People's Ice "Company, another corporation which held a thousand shares "of the capital stock of the corporation debtor, and to its "objection that it was *ultra vires* for it to hold stock in "another corporation it was held that as it did not appear that "it was not within the scope of its power to hold stock in the "defendant corporation under any circumstances, or for any "purpose, and as the circumstances under which it had "acquired the stock were not shown, the defense could not be "maintained."

"There is no provision in the Statute by which a national "bank is expressly prohibited from becoming a stockholder in "another corporation, and while it may be conceded that its "subscriptions to the shares of another corporation would be "so far in excess of the powers conferred by the Statute "under which it was organized that the executory contract "therefore would not be enforced, it by no means follows "that if such a contract is executed and it has been regis- "tered as such stockholder, it is not entitled to a voice in its "corporate management, or to its share of the corporate "earnings, while the corporation is in existence, or of its "assets upon a dissolution thereof. It may take shares in "another corporation as collateral security for the loan made "by it, and if the loan is not paid it may become the owner "of these shares and have them registered in its name upon "the books of that corporation; and in such a case it is sub- "ject to the same liabilities as any other stockholder.

"In *National Bank vs. Case*, 99 U. S., 628, the Bank had "become a stockholder in another corporation under such "circumstances, and it was held to be liable for its propor- "tion of the debts of the corporation in which it had been a "stockholder, although it had transferred the stock to one of "its clerks for the purpose of avoiding such liability.

"As the appellant herein could have taken stock of the "savings bank in satisfaction of a loan for which it had "been pledged to it as security, it was within the scope of its "power to become a stockholder therein, so that it cannot be

"said that it was prohibited by Statute from becoming such "stockholder. Having caused itself to be registered upon "the books of the corporation as a stockholder, any person "dealing with the corporation would be justified in assuming "that it had become such stockholder by virtue of the trans- "action within its powers rather than in violation of the laws "of its creation, and so long as it held itself out as such it "ought not to be permitted to defend against its liability as "such stockholder by showing that it had become such in "violation of law. * * * * * The appellant has not "repudiated the agreement under which it received the stock, "but still retains it, and so far as is shown by the record "claims to be the owner of it and to share in all the earnings "and assets of the corporation. During the period that it "has claimed to be such owner it has received dividends out "of the assets of the savings bank, and to that extent "diminished the corporate property which otherwise might "have been appropriated in satisfaction of the plaintiff's "claim. (See *Mitchell vs. Beckman*, 64 Cal., 117.) "Having had the benefits of the transaction and still enjoy- "ing its fruits it is estopped from denying a liability which "is correlative to such benefit and fruits and dependent "thereon."

It might be further said that the National Bank, by accepting and retaining the stock of the savings bank, not only diminished the corporate property to the extent of the dividends paid and received by it, but also prevented other parties from purchasing and holding the said stock and by so doing further diminished the security to which the creditors of the savings bank were entitled to look for the purpose of securing deposits.

We think it clear that the decision of the Supreme Court of this state, of this case is correct and that the reasoning of the court in reaching its conclusion is sound. and that we might safely rely upon that decision alone and the reasoning set forth for an affirmation of the case at bar. We will, however, call the attention of the court to a few other authorities and principles of law upon the question.

It is a principle recognized quite generally by the law and outside of it that one who may profit by the gains of an enterprise should bear its losses rather than that they should fall upon strangers.

Beale vs. Essex Savings Bank, 67 Fed Rep. 816, 818.

Another well recognized principle of law is that no man can set forth in his own defense that he has violated the law.

United States vs. Baxter, 46 Fed. Rep. 350, 353.

It seems to be well settled that a national bank or other corporation can not set up want of legal capacity in order to escape responsibility.

Webber vs. Spokane National Bank, (Circuit Court of Appeals, Ninth Circuit, 64 Fed. Rep. 208, 210.
Bank vs. Case, 99 U. S., 628, 633.
Fisher vs. Simons (Circuit Court of Appeals, Third Circuit), 64 Fed. Rep., 311, 314.
Main vs. Casserly, 67 Cal., 127, 128.
Bradly vs. Ballard, 55 Ill., 413, 8 Am. Rep, 656.

In *Weber vs. Spokane National Bank, supra*, the bank had, in direct violation of the provisions of Section 5202 of the Revised Statutes, incurred indebtedness in excess of the amount of its capital stock and when sued pleaded as a special defense that at the time of the making of the notes and the sale of the furniture, in consideration of which they were given, the bank had already incurred indebtedness and had become liable for amounts aggregating a sum much greater than the amount of its paid-up capital stock, so that by virtue of Section 5202 of the Revised Statutes it was prohibited from incurring the indebtedness sued on. The Court, in speaking of the above defense, at page 210, used the following language:

" A second question, and the one that was principally dis-
" cussed upon the argument, concerns the effect of the Statute
" upon the debt which is contracted in violation of its pro-
" hibition. The Statute is directed to the banking associa-
" tion, and prohibits it from incurring the proscribed liabil-
" ity. It does not, in terms, declare void the debt or liabil-
" ity so incurred, and no penalty is denounced against the
" bank for violation of the prohibition, unless it be the gen-
" eral penalty provided for in Section 5239, where it is
" declared that if any of the prohibitions of the law govern-
" ing national banks are violated, with the knowledge of the
" directors, the charter of the bank shall be forfeited. Is the
" inhibited debt void, and may the banking association retain
" the property which it acquires under such circumstances
" and deny its liability for the stipulated consideration? We
" find no reported decision of this question, but certain other
" sections of the Statutes defining the power of national bank-
" ing associations and prohibiting them from doing certain

" specified acts, have been the subject of adjudication. The " tendency of all the decisions has been to refer to the gen- " eral government the power to deal with all violations of the " act, and to hold that acts done without the scope of the pre- " scribed powers of the bank, or in violation of the express " terms of the statute for their guidance, are not void, but are " voidable only. Thus section 5136, by implication, prohibits " a national bank from loaning money upon real estate se- " curity, yet it is held that a mortgage taken upon real estate " to secure a contemporaneous loan or future advances is not " void, but merely voidable, at the instance of the govern- " ment. Bank v. Matthews, 98 U. S. 621; Bank v. Whitney, " 103 U. S. 99. Section 5201 expressly prohibits a loan by a " national bank upon the pledge of its own shares; but it has " been held that, if the prohibition could be urged against the " validity of a transaction by any one except the government, " it could only be done before the contract was executed, and " while the security remained pledged, and that the illegality " of the transaction would not render the bank liable to the " pledger for the payment to him of the money realized " upon the sale of the security. Bank v. Stewart, 107 U. S. " 672, 2 Sup. Ct. 778. Section 5200 provides that no bank " shall loan to one person or firm an amount to exceed one- " tenth of its actually-paid capital stock; but it is held that, " if a greater sum is loaned than is allowed by this section, " that fact may not be set up in defense to an action for re- " covery of the money so loaned (Gold Min. Co. v. National " Bank, 96 U. S. 640), and that the statute was intended as a " rule for the government of the bank, and did not render the " loan void (O'Hare v. Bank, 77 Pa. St. 96; Pangborn v. " Westlake, 36 Iowa 546). We think the reasoning upon " which these conclusions are reached is applicable to the case " before the court. We hold, therefore, that an indebtedness " which a national bank incurs in the exercise of any of its " authorized powers, and for which it has received, and re- " tains the consideration, is not void from the fact that the " amount of the debt surpasses the limit prescribed by the " statute, or is even incurred in violation of the positive pro- " hibition of the law in that regard."

It seems to us that the above case goes further in upholding the proposition for which we contend than is necessary to sustain the judgment of the Supreme Court of this State in the case at bar. It will be observed that in the case of Webber vs. Spokane National Bank there was a direct violation of

a prohibitory provision of section 5202 of the Revised Statutes, and yet the court held that the defendant national bank was estopped from setting up its want of legal capacity in order to relieve itself of liability.

In Bank vs. Case supra, the facts were that a national bank had taken as collateral security for a loan, certain shares of stock of another national bank, and the latter bank becoming insolvent, the former, upon being sued as a stockholder, attempted to escape liability by setting up that it was not authorized to make a loan with the stock of another bank pledged as collateral security, but the court at page 633 says :

" There is nothing in the argument in behalf of the appel-
" lant that the bank was not authorized to make a loan with
" the stock of another bank pledged as collateral security.
" That is an ordinary mode of loaning, and there is nothing
" in the letter or the spirit of the national banking act that
" prohibits it. *But if there were, the lender could not set*
" *up its own violation of the law to escape the responsi-*
" *bility resulting from its own illegal action.*"

The court in the above case, in speaking of the reason why one whose name appears upon the books of a corporation as a stockholder should not escape liability, uses the following language at page 631 :

" For this several reasons are given. One is that he is
" estopped from denying his liability by voluntarily holding
" himself out to the public as the owner of the stock and his
" denial of ownership is inconsistant with the representations
" he has made; another is *that by taking the legal title he*
" *has released the former owner;* and the third is that after
" having taken the *apparent ownership and thus become*
" *entitled to receive dividends, vote at elections, and enjoy*
" *all the privileges of ownership it would be inequitable*
" *to allow him to refuse the responsibilities of a stock-*
" *holder.* The subject is well treated in Mr. Thompson's re-
" cently published work on 'The Liability of Stockholders,'
" where may be found not only a full collection of authorities
" but a careful analysis of what the authorities contain.
" *Vide c.* 13."

(The italics in the above quotations are our own.)

There is no direct provision of the National Banking Act which prohibits a national bank from purchasing shares of the capital stock of another corporation, and it is very clear that a national bank may become the owner and holder of shares of stock of other corporations. If a national bank has

authority to loan money on the stock of another bank as collateral security it must necessarily follow that a national bank may become the owner of such collateral.

That a national bank may loan money upon the stock of another bank for security is clearly decided in

Bank vs. Case, 99 U. S., 621, 633, *supra.*

In *Main vs. Casserly*, 67 Cal., 128, *supra*, the Court says:

" Assuming that the contract of purchase was *ultra vires*, " *the law does not allow a corporation to retain the* " *benefits which it has received from the contract and* " *escape liability upon it.* ' The invalidity of a contract,' " says Mr. Sedgwick in his work on Statutory and Constitu- " tional Law, p. 73, ' is subject to the equitable exception " 'that, although a corporation in making a contract acts in " 'disagreement with its charter, where it is a simple question " 'of capacity, or authority to contract, arising either on a " 'question of regularity of organization or of power con- " 'ferred by the charter, a party who has had the benefit of " 'the agreement cannot be permitted, in an action founded " 'upon it, to question its validity. It would be in the high- " 'est degeee inequitable and unjust to permit the defendant " 'to repudiate a contract the fruits of which he retains.' "

" The exception referred to is founded upon the fact that " the contract, though invalid, has been executed in the inter- " ests of the corporation and for its benefits and advantage. " Where, therefore, it has received the fruits of such a con- " tract it cannot refuse payment on the ground that it had no " power to contract. It would be otherwise if the contract " had not been executed."

In *Ballard vs. Bradley*, 55 Ill., 413, *supra*, the Court, in speaking of the defense of *ultra vires*, at page 417, uses the following language:

" Neither is it correct to say that the application to cor- " porations of the doctrine of equitable estoppel where jus- " tice requires it to be applied, as when under a claim of cor- " porate power they have received benefits for which they " refused to pay from a sudden discovery that they had not " the powers they had claimed, can be made the means of " enabling them indefinitely to extend their powers. If that " were true it would be an insuperable objection to the appli- " cation of the doctrine even for the purpose of preventing " injustice in individual cases. But it is not true. This

" doctrine is applied only for the purpose of compelling cor-
" porations to be honest in the simplest and commonest sense
" of honesty; and after whatever mischief may belong to the
" performance of the act *ultra vires* has been accomplished.
" But while a contract remains executory, it is perfectly true
" that the powers of corporations cannot be extended beyond
" their proper limits for the purpose of enforcing a contract.
" Not only so, but on the application of a stockholder, or of
" any other person authorized to make the application, a
" Court of Chancery would interfere and forbid the execution
" of the contract *ultra vires*. So, too, if a contract *ultra*
" *vires* is made between the corporation and another person,
" and while it is as yet wholly unexecuted, the corporation
" recedes, the other contracting party would probably have
" no claim for damages. But if such other party proceeds in
" the performance of the contract, expending his money and
" his labor in the production of value, which the corporation
" appropriates, we can never hold the corporation excused
" from payment on the plea that the contract was beyond its
" power.

" In cases of such a character Courts simply say, you can
" not, in this case, raise the question of your power to make
" the contract. It is sufficient that you have made it, and by
" so doing have placed in your corporate treasury the fruits of
" others' labors, and every principal of justice forbids that
" you be permitted to avoid payment by an appeal to the
" limitations of your charter."

All the cases above referred to are, like the one at bar, where national banks or other corporations have undertaken to set up its want of legal capacity to escape responsibility.

There is another line of decisions, however, holding that a debtor of a national bank cannot set up as a defense that the bank exceeded its authority in making the loan, and that the fact that a contract made by a national bank is *ultra vires* as being contrary to the National Banking Act, can not be set up in defense to an action growing out of such contract.

Gold Mining Company vs. National Bank, 96 U. S., 640.

Wyman vs. Citizens' Bank, 29 Fed. Rep., 734.

National Bank vs. Matthews, 98 U. S., 621.

Volts vs. National Bank, 42 N. E, Rep. (Ills.), 69.

National Bank vs. Whitney, 103 U. S., 99, 101, 102.

Fortier vs. New Orleans Bank, 112 U. S., 439, 451.

Walden National Bank vs. Birch, 29 N. E Rep. (N, Y.), 127, 128.
National Bank of Xenia vs. Stewart, 107 U. S., 676.

In the case of the *Gold Mining Company vs. National Bank, supra*, the defendant was sued by a national bank for money loaned him, and he set up as a defense that the bank in making the loan had exceeded its authority in that the amount loaned him exceeded one-tenth of its capital stock actually paid in, which was a violation of Section 5200 of the banking act, but the court held that the defendant could not set up such a defense as a bar.

In the case of Volts vs. National Bank, 42 N. E. 69 *supra*, it was claimed that the bank having made the loan in question on the security of shares of its own capital stock in direct violation of the provisions of section 5201 of the national banking act that no recovery could be had, but the court held that assuming that proposition to be true that the defendant could take no advantage of it because the act imposes no penalty either upon the bank or borrower if a loan upon such security is made.

It is held in the case of National Bank vs. Whitney, 103 U. S. 101, above cited, that the objections to the taking of a mortgage by a national bank upon real estate to secure future advances could only be made by the United States.

If a debtor of a national bank is not authorized to set up as a defense the incapacity of a bank why should the bank itself be permitted to plead the want of legal capacity in order to escape liability.

A person who has caused or allowed his title to shares of stock to be registered on the books of a corporation can not deny the truth of that representation and disavow the ownership when it ceases to be a benefit and becomes a burden.

In the matter of the Reciprocity Bank, 22 N. Y., 9.

The proceeding in the above case was one to enforce the liabilities of stockholders of a banking corporation and association under a constitutional provision and statute somewhat similar to that, under which stockholders of corporations are made individually liable for the indebtedness of such corporation in this State, and some of the parties interested contended that they were not liable to be assessed on the ground that the bank had no authority to sell the stock held by them, and the court speaking of that question at page 16, says :

" Mr. Alexander, and some other parties, were assessed in " respect to certain shares of stock which they purchased from

" the bank in January, 1856. It appears that some time pre-
" vious to that date the bank had taken a surrender of a con-
" siderable amount of its own stock in payment of debts which
" the holders owed to the institution, and which it seems they
" were otherwise unable to pay. It was supposed that divi-
" dends could not be made until this stock was disposed of and
" reissued. For that reason it was offered for sale, and por-
" tions of it were sold to Alexander and other persons, who
" have appealed from the proceedings by which they were
" assessed. They bought at 90 per cent. on the par value of
" the stock, and gave their notes for the price, it being under-
" stood that the scrip should be left in the bank as collateral
" to the notes, and that they might afterwards re-transfer the
" stock and take up the notes. They were credited with the
" shares on the stock books, and except as to Mr. Alexander,
" the shares stood in their name until the failure of the bank.
" Mr. Alexander made a re-transfer on the 6th of March,
" 1857. The failure of the bank was on the 27th of August
" following.

" The objection to the apportionment of liability urged by
" this class of appellants as peculiar to themselves, is that the
" bank could not, in the manner stated, legally become the
" purchaser or owner of its own stock, and therefore, that
" these persons could not and did not acquire a derivative
" title from the bank. In support of this objection the
" statutes have been referred to, which imposes restraints
" upon the specially chartered banks in this State, in respect
" to dealing in their own stock. (1 R. S. 539.) We think it
" unnecessary to inquire whether the purchase by this bank
" of shares of stock under the circumstances above mentioned,
" falls within those restraints.

"Assuming that the bank owned the stock, the directors
" caused it, or a portion of it, to be sold to Alexander and
" others. They became actually the purchasers, and they
" voluntarily suffered their names to appear as stockholders
" on the books. They cannot, *in this proceeding, impeach*
" *their own title.* The Statute of 1849, imposing the per-
" sonal liability, declares that the term 'stockholder' shall
" apply not only to such persons as appear by the books of
" the corporation or association to be such, but also to every
" equitable owner. (Section 2.) No doubt a person may
" show, in exoneration of himself, that his name has been
" placed in the books without his consent. *But if a party*
" *makes actual purchase of shares, whether from the*

" *bank or an individual holder, and voluntarily allows* " *himself in this manner to be represented to the world as* " *a stockholder, he must take the responsibilities of that* " *situation.* He comes within the terms and the policy of " the act. His title may be imperfect. Equities may exist " between him and other parties; the shares may be in dis- " pute; they may be claimed by some one else in hostility to " his own right. The Statute has no regard to such ques- " tion. *The person who has caused or allowed his title to* " *be registered on the books can not deny the truth of that* " *representation and disavow the ownership when it ceases* " *to be a benefit and comes to be a burden.*" Italics our own.

The plaintiff in error in the case at bar is seeking to impeach its own title to the shares of the capital stock of the savings bank held by it in order to escape responsibility.

The national bank seemed to be willing and ready to hold the stock and admit its ownership so long only as such ownership was beneficial and profitable, but when the tables were turned, and to admit being the owner of the stock became a burden, it immediately undertook to impeach its title.

The creditors of the savings bank, when becoming such, had a right to rely upon the responsibility of the shareholders as shown by the books at the time.

Foster vs. Lincoln, 74 Fed. Rep., 383.

II.

We do not agree with counsel for plaintiff in error that it was necessary for Mr. Nat Kennedy to show upon the trial of this case that either himself or the City of San Diego knew at the time the moneys in question were deposited with the California Savings Bank that the California National Bank was a stockholder of the former bank, in order to hold the national bank liable.

Irons vs. Manufacturers' National Bank, 27 Fed. Rep., 591.

The above case was one brought to enforce the liability of the stockholders of a national bank, and some of the stockholders made the defense that before the bank became insolvent they had parted with their stock, and upon this question the Court, at page 595, says:

" Counsel for Mr. Charles Comstock have re-argued at " length the question of the good faith of the transfer of his " capital stock, the proof shows that Mr. Comstock appeared

" by the records of the bank to be the holder of 150 shares of " its capital stock on the day the bank closed its doors; but " it is claimed that the proof in the case shows that as early " as Feb. 1873, Mr. Comstock sold 50 shares of his stock to " Ira Homes, and that in June, 1873, he sold 50 shares more; " but that, owing to inadvertence or neglect, no transfer " was made upon the records or books of the company; and " no change of ownership of stock was made until the day " before the bank suspended, when the original stock was " cancelled and new certificates issued to the purchasers. I " conclude that for the purpose of determining the individual " liability of a shareholder for the debts of the national bank " he must be construed and held to be such shareholder up to " the time there is an actual transfer of his stock upon the " books of the bank. *So long as a man appears upon the " books of the bank to be a shareholder, the presumption " of law is that the debts of the bank are contracted upon " the faith of his responsibility as such shareholder*; and " while it may be a hardship upon Mr. Comstock to enforce " this individual liability as to shares which he may have " sold in good faith several months before the failure and " when the bank was in good credit, with no intention of " perpetrating fraud, yet, at the same time, he was the only " person, in the eye of the law at least, to whom the creditors " of the bank will be presumed to have looked for the pur- " pose of giving credit to the bank, and therefore it is his " misfortune if he delayed change of title until insolvency " intervened."

The italics are our own.

The rule laid down in the above case, it seems to us, is the correct one in cases like the one at bar, and that so long as the name of the California National Bank appeared upon the books of the savings bank as a shareholder the law presumes that the debts of the savings bank were contracted upon the faith of the liability of such shareholder.

III.

Counsel for the plaintiff in error, at page 4 of his brief, says:

" The city's money was not actually deposited by the " defendant in error on the 2nd of March. They were " already there," etc.

In reply to above we contend that the question as to the time when the city's money was deposited in the savings bank

is not and was not an issue in this case, for it is admitted in the pleadings that the moneys were deposited in the savings bank at the various times alleged in the complaint.

It alleged in the first count of the amended complaint "That on the 2nd day of March, 1891, the plaintiff, as City "Treasurer, deposited with the defendant, the California "Savings Bank, * * * the sum of $10,000." (p. 3.)

The second count contains a similiar allegation to the first. (p. 4.)

In the third count it is alleged "That on the 14th day of "July, 1891, the plaintiff, as City Treasurer, deposited with "the defendant, the California Savings Bank, * * * the "sum of $10,000." (p. 6.)

The fourth count contains a similiar allegation to the third, (p. 7) and

In the fifth count of the amended complaint it is alleged "That on the 4th day of November, 1891, the plaintiff, as "City Treasurer, deposited with the defendant, the California "Savings Bank, * * * the sum of $5,500." (p. 8.)

The above serveral allegations of the amended complaint as to the time when the money in question was deposited in the savings bank are not denied in the answer, and it therefore stands admitted that the moneys in question were deposited and the indebtedness incurred at the times alleged in the amended complaint; that is to say, $20,000 March 2d, 1891: $20,000 July 14th, 1891; and $5,500 November 4th, 1891.

All the defense made by the California National Bank is as follows:

"Now comes the defendant, the California National Bank, "and, in answer to the first count of complaint filed herein, "denies that at all or any of the times mentioned in the com- "plaint the defendant, the California Savings Bank, was at "any time or now is the owner of nine hundred and ninety "shares of the capital stock of the California Savings Bank, "or of any number of shares therein, and alleges that if any "stock of the California Savings Bank was ever issued to this "defendant it was issued without authority from this corpor- "ation defendant and without authority of law. Defendant "also alleges that it has never acquired in the usual course of "business or now has as owner any stock of the said defend- "ant, the California Savings Bank." (p. 12.)

The answer to each of the five counts of the complaint is similar to the above. (pp. 12–13.)

With the pleadings as abov stated we submit that there

was no issue made at the trial as to the time when the indebtness of the savings bank was incurred and that no evidence was required on the part of the plaintiff in the court below touching the question as to when the moneys in question were deposited with the savings bank and that the court below was justified in finding, as it did, as follows:

"That the plaintiff, as the City Treasurer of the City of "San Diego, made the following deposits of money, as such "Treasurer, in the bank of said defendant, the California "Savings Bank, to-wit:

"On the 2nd day of March, 1891, the sum of $10,000.

"On the 2nd day of March, 1891, the further sum of $10,-"000.

"On the 14th day of July, 1891, the further sum of $10,-"000.

"On the 14th day of July, 1891, the further sum of $10,-"000, and on the 4th day of November. 1891, the further "sum of $5,500, being in all the sum of $45,500." (p. 14).

And further, at the same page, the court finds as follows:

"That at the time of making such deposits, and at all "times mentioned in the plaintiff's complaint, * * * the "defendant, the California National Bank, were, and still "are, stockholders in the said defendant the California Sav-"ings Bank."

We further submit that as the question in regard to the time when the money was deposited and the indebtedness incurred was not made an issue in the court below it is now too late to raise that question, and that the federal question before this court does not include the question as to the time of the incurring of the indebtedness in question, and that the pleadings and findings of the court below are conclusive of that question.

At all events the testimony of Mr. Hill referred to by counsel for plaintiff in error in his brief, in regard to when the moneys were actually deposited, only goes to the deposits of March 2, 1891, and not to those of either July or November of the same year. (p. 18).

The judgment of the court below we think is clearly right and should be affirmed.

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